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ALEXANDER L. STEVAS
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NO. 82-569

IN THE
SUPREME COURT OF THE UNITED STATES

_____, Term 19___

HENRY PEDERSEN and
ANN PEDERSEN, his wife,
Petitioners

vs.

SOUTH WILLIAMSPORT AREA
SCHOOL DISTRICT, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR

THE THIRD CIRCUIT

Clifford A. Rieders, Esquire
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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Circuit Court improperly affirmed a judgment in favor of Defendant School District where a jury found that a public employee with a property interest in his job knew of his right to a due process hearing but did not voluntarily and knowingly waive it?

2. Whether the Circuit Court erred in finding that a state statute required a due process hearing only when requested, when both state and federal law require that a terminated employee be given notice of his right to a hearing?

3. Whether the Circuit Court in *dicta* properly found that an arbitration hearing with respect to a collective bargaining agreement satisfied due process where the hearing and decision took place eight (8) months after the termination and there is no reason why the School Board could not have had a timely due process hearing?

4. Whether an arbitration procedure under a collective bargaining agreement can satisfy due process under the law as set forth in Barrentine vs. Arkansas-Best Freight System, Inc., 101 U.S. 1437 (1981)?

PARTIES IN THE PROCEEDING BELOW

The parties in the proceeding below were Henry Pedersen, the terminated employee, and Ann Pedersen, his wife, the latter having asserted a claim for loss of consortium, society and the like. Defendants, in the Court below, were the South Williamsport Area School District which employed Henry Pedersen, Edward A. Vollbrecht, the Superintendent of the School District, who terminated Mr. Pedersen, Robert G. Lesher, Vollbrecht's assistant, Fred Agnoni, Danny Reeser and George Michael. The latter three individuals allegedly conspired with the School District to have Henry Pedersen terminated.

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The District Court in an Order filed August 8, 1980, (12a-14a) denied a Motion to Dismiss and for a stay filed by Defendants indicating that exhaustion of state and union remedies were not required and that the Collective Bargaining Agreement did not cover procedures for termination. On December 19, 1980 (167a-175a) the District Court filed an Order denying Defendants' Motion for Partial Summary Judgment and finding eleven (11) facts to be without substantial controversy. The Court acknowledged that a state law granting Pedersen his property interest required a post-termination board hearing, but it did not regard the board as a necessary forum. The District Court stated that Pedersen was entitled to be informed of his right to a post-termination due process hearing unless he "knew of his right to demand a hearing." The Court also cast aspersion on a board hearing held for Mr.

Pedersen October 6, 1980 well after litigation was initiated by the District against Plaintiff for some minor criminal matters arising out of the termination and considerably after Plaintiff's civil rights action was pending against the District.

On January 26, 1981, (176a-186a) the District Court issued an Opinion and Order granting Defendants' Motion for Summary Judgment with respect to Count IV of the Complaint and also granting said Motion with respect to that portion of Count V which alleged intentional interference with contractual relations by the School District. In all other respects the Motion was denied. The Court reaffirmed that the School Board's contentions concerning the effect of the grievance proceeding under the union contract presented material issues of fact precluding an award of summary judgment.

On March 26, 1981, (187a-223a) the Court ruled with respect to motions by both parties

for reconsideration of prior orders as follows: Defendants' Motion for Summary Judgment with respect to Count I was granted to the extent that the only material facts in dispute "are the reasons for the delay in the arbitration hearing and whether Pedersen waived his right to a hearing before the Board of School Directors." The Court also granted Defendants' Motion for Summary Judgment with respect to Count III of the Complaint and with respect to Count V of the Complaint. In all other respects the Motions for Summary Judgment were denied. The Court reversed its view in the March 26, 1981 Opinion and held that the arbitration hearing held approximately nine (9) months after Pedersen was terminated might be sufficient to satisfy due process notwithstanding the state law creating Pedersen's property interest.

On May 4, 1981, the District Court ruled that the law of the case was altered by a U. S. Supreme Court decision.

Barrentine v. Arkansas-Best Freight System Inc., 101 U.S. 1437 (1981). The District Court opinion was supplemented by an Order of May 6, 1981. The Court denied Defendants' Motion for Summary Judgment and modified its opinion of March 26, 1981. (See attached) The Court found that because the union rather than Pedersen was responsible for processing the grievance and because the union did not have the same interest in the arbitration as did Mr. Pedersen, the arbitration proceeding, even if timely and properly conducted, was not sufficient to provide Plaintiff with the process to which he was entitled. On May 18, 1981, (see attached) the Court dismissed the case based upon a jury verdict which found that although Plaintiff knew of his right to a hearing he did not voluntarily waive a due process hearing.

In an Opinion filed April 30, 1982, the United States Circuit Court for the Third

Circuit affirmed the District Court. (See attached). A petition for rehearing or rehearing en banc was mailed May 13, 1982. The Circuit Court in an Order dated June 9, 1982 denied the Petition, per Weis, Judge. (See attached)

The statutory provision conferring jurisdiction on this Court to review the judgment in question by Writ of Certiorari can be found at 28 U.S.C. §1254(1). The time limit for the appeal is found at 28 U.S.C. §2101(c) See also Supreme Court Rule 20(4) dealing with Petitions for Rehearing.

JURISDICTION OF THE SUPREME COURT

Date of the judgment or decree sought to be reviewed and the time of its entry.

The Circuit Court on June 17, 1982, certified as a true copy a judgment affirming the lower court and issued same in lieu of a formal mandate. The Circuit Court denied a Petition for Rehearing on June 9, 1982. See Appendix.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS WHICH THE CASE INVOLVES

1. U. S. Constitution, Fourteenth Amendment

> * * * no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Amendment XIV, §1, U.S.C.

2. Pennsylvania School Code

> The Board of School Directors in any school district, except as herein otherwise provided, shall, after due notice, giving the reasons therefore, and after hearing if demanded, have the right at any time to remove any of its officers, employees or appointees for incompetency, intemperance, neglect of duty, violation of any of the school laws in this Commonwealth or other improper conduct. 24 P.S. §5-514.

3. Civil Rights Act

> Every person who, under color of any statute, ordinance, regulation, custom or usage or any State or Territory... subjects, or causes to be subjected, any citizen

of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit, inequity, or other proper proceeding for redress. * * *

4. Pennsylvania Administrative Procedure Act

No adjudication of a local agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard. * * * 2 Pa.C.S.A. §553.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the Court of first instance is 28 U.S.C. §1343 because the action was predicated upon 42 U.S.C. §1983.

The facts material to consideration of the questions presented are as follows:

1. In a letter dated November 9, 1979 Pedersen was notified that effective immediately he was suspended for five (5) work days without pay. The notification stated that the District intended to discharge Pedersen. The employee was informed that his discharge would be subject to review by the School Board and that a hearing on the charges would be held before the Superintendent the following week. The letter was signed by Robert G. Lesher, Assistant to the Superintendent before whom the hearing was to be held. (16a).

2. In a letter dated November 12, 1979 Pedersen was informed of the pre-termination

hearing to be held before Superintendent Vollbrecht and a list of several charges followed. (17a-18a).

3. The Superintendent conducted the pre-termination hearing based on the charges written by his subordinate and asked Mr. Lesher for a recommendation on behalf of the School District. (19a-20a).

4. Mr. Lesher recommended termination and after a recess for deliberation the Superintendent stated "my decision is that Mr. Pedersen be terminated from the School District effective November 19, 1979, the end of the suspension period. This decision will be presented to the Board of Education, in executive session." (20a).

5. In a letter dated November 20, 1979 Pedersen was informed by Vollbrecht that he was dismissed from his job although the letter contained no recitations of fact or conclusions of law. (21a).

6. The Administrator, Robert Lesher, who presented the charges against Pedersen

and made a recommendation at the Superintendent's pre-termination hearing serves at the "desire" of Dr. Vollbrecht. (25a). Lesher believes that the superintendent controls his job. (26a). Prior to the pre-termination hearing the Superintendent met with Pedersen's co-workers who were to be the chief witnesses against him and with Robert Lesher to discuss the evidence. (29a-31a). Dr. Vollbrecht even went so far as to ask Pedersen's chief accuser if he would testify against Pedersen. (33a). At an executive session the Board of Directors of the School District were given the facts by Vollbrecht and voted to terminate Pedersen. (44a-45a).

7. After the federal complaint was filed the School District filed criminal charges against Pedersen and held a Board hearing in October of 1980. (49a-52a). The Board, before its hearing in October, was fully aware of the complaint, had discussed

it and had discussed defenses with defense counsel. (52a-53a).

8. The Board was involved with the criminal charges and learned what the various witnesses said at different hearings prior to the hearing which the Board gave Pedersen in October of 1980. (54a-58a).

9. The refusal of the District Judge to dismiss the case or stay same upon the School District's request was the reason for the October 1980 Board hearing. (59a-60a).

10. At the Board hearing it was up to Pedersen to "convince the Board that the Administrators presented the wrong facts". (60a).

11. It was admitted that the School Board itself must give some kind of hearing. (67a). The Superintendent acknowledged that if he was in the position of a Board member in October, having heard all the facts from the administration point of view as the Board had done, he would have been biased. The Administrator stated that the Board had

essentially heard all the facts. (69a-70a).

12. Henry Pedersen filed a grievance and the arbitration was held in July of 1980. The Complaint was filed on April 15, 1980 and the discharge took place in November of 1979. (78a-91a).

13. The District Court found that the parties were in agreement that under state law Pedersen could not be terminated absent good cause and that it was the Board of Directors of the School District which had the authority to terminate him. (168a).

14. On the waiver issue, Pedersen testified that since the School Board hired him he was "under the impression that they can fire me." (242a). He believed that he should be able to "get up and speak and say my piece in front of the Board." (242a-243a). Pedersen testified that on previous occasions he attempted to speak before the Board at public sessions but he was told that he could

not speak about personnel matters at that time and should sit down. (252a-253a).

15. Pedersen stated that at the Superintendent's pre-termination hearing a Union representative showed up but he did not inform Pedersen of his rights and "[h]e was there just from the Union." (262a-263a). The Union representative told Pedersen that he could go to arbitration but he told him nothing else. (267a). The Union representative did not tell Pedersen anything about his rights and the discussions between Pedersen and the Union representative were "just about whether they were going to handle the grievance or not." (280a).

16. Pedersen talked to one of the Board members, Mr. Nolan, about a School Board hearing and the official responded that "he did not know what was going on up there anyway." (290a-291a). Nolan was a school director at the time of the relevant proceedings. Pedersen testified that he did not know he had to request a Board hearing.

(294a). The maintenance employee understood that he had a right to "speak to the School Board" but he obviously did not understand the pre-requisite of a formal hearing. (294a).

17. Pedersen had ten (10) years of education in England but presently is a citizen of the United States. Pedersen did not know of his right to a "formal" hearing before the School Board. (314a-316a). Aside from his representation in the present case Pedersen was never notified of the requirements of the law. (316a-318a).

18. A few weeks before the firing Mr. Caldera, President of the School Board at the time, refused to permit Pedersen to speak at a public meeting concerning problems on the job (331a) but Caldera never told Pedersen at any time that he had a right to a hearing by the entire Board sitting as an impartial fact finder. (332a).

19. John Hatfield, a Union

representative, told Pedersen that he did not think a School Board hearing would be worthwhile. (360a). Hatfield never explained the nature of the hearing before the School Board and the requirements thereof. (360a-361a).

20. The Court ruled on points for charge granting Pedersen's 1 through 4, 7 and supplemental 1. (See attached). It covered Pedersen's 13.1, 14 and 15. (See attached).

21. The jury was charged that Mr. Pedersen could not waive his right to a Board hearing to which he was entitled unless he knowingly, voluntarily and intelligently waived that right. (426a).

22. The jury was informed that state and federal law requires that Pedersen be informed of his right to demand a hearing and that the employee should not be expected to investigate Title 24 of Purdon's Statutes to determine whether he has a right to a hearing. (427a).

23. The jury unanimously found that in

November of 1979 Henry Pedersen knew that he had the right to ask for an impartial hearing before the Board of Directors of the South Williamsport Area School District concerning his termination but in response to the second question the jury found that Pedersen did not voluntarily give up his right to such a hearing by the Board of Directors. (See attached).

24. The trial continued on the question of good faith of the individual defendants and whether Pedersen would have been dismissed if he had been given a due process hearing in a timely fashion by the Board. The Court granted a mistrial and entered judgment for defendant on the special verdict questions.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

It is the position of Pedersen that the Circuit Court clearly doparted from precedent in the field of procedural due process.

There is no disagreement that Pedersen was entitled to a timely due process hearing. Pennsylvania School Law defines the hearing which is due. 28 P.S. §5-514. There can be no disagreement that the pre-termination hearing held by the Superintendent and the Board hearing of October 6, 1980 were not appropriate due process hearings. The first "hearing" was prior to termination and was given by the Superintendent after consultation with witnesses and the prosecuting officer. The Board hearing in October of 1980, as found by the District Court, was not timely and was given by a Board hopelessly prejudiced by virtue of the fact that the District was a defendant in a civil rights case, that the Board had authorized criminal action against Pedersen,

and perhaps most importantly because it was stated by George Girio (President of the Board at the time) that the specific reason for the Board hearing was to moot the federal case.

Defendants claimed, pursuant to District Court invitation, that Pedersen knew of his right to a due process hearing, did not ask for a hearing before the Board and therefore waived it. The State law requiring notice of a hearing has been established for many years in the Commonwealth of Pennsylvania and is consistent with federal court cases. Swartley v. Norristown Area School District, 414 A.2d 153 (Cmwlth.Ct.1980) relying upon Hetkowski v. Dickson City School District, 141 Pa.Super. 526, 15 A.2d 470 (1940) which in turn relied upon Swink's Case, 132 Pa.Super. 107, 200 A. 200 (1938).

Federal authority is in accord. Memphis Light, Gas & Water Division v. Craft, 436 U.S.1, 98 S.Ct. 1554 (1978), Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074

(1976) and Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972). These three cases focused on the availability of a local and municipal law remedy as evidence of the State's recognition of a protected interest.

> The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending "hearing". At 98 S.Ct. 1563 (footnote omitted).

In footnote 15 the Court stressed that individuals "should be informed clearly of the availability of an opportunity to present their complaint" id. (emphasis added).

It becomes obvious that a person cannot waive a right unless it exists and he knows about it. It is the position of Pedersen that the School District was required to inform him of the hearing available and the nature of same. The School District, of course, did not do this. A hearing must be held at a meaningful time and in a meaningful manner in order to satisfy due process and

notify the party to be effected of his rights. Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187 (1965).

The District Court followed Supreme Court authority with respect to waiver of a Constitutional right but then ignored the cases in entering judgment for defendant. D. H. Overmeyer Co. v. Frick, 405 U.S. 1867, 92 S.Ct. 775 (1972) and Brookhard v. Janis, 384 U.S. 1, 86 S.Ct. 1245 (1966) are controlling. The District Court was required to prove any waiver of federal law by "clear and positive" proof. The burden on the School District is "heavy". Perhaps most important, a waiver must be intelligent and knowing, meaning that a person must understand the nature of the right before he can give it up. Notice of a person's due process cannot be "a mere gesture...." Parratt v. Taylor, 101 S.Ct. 1908, 1914 (1981) citing Mullane v. Central Hanover Trust Co., 339 U.S. 396 70 S.Ct. 652 (1950).

The jury obviously believed that although Pedersen knew of his right to a hearing in a general sense there was no "clear and positive" proof that Pedersen knowingly and intelligently waived the procedure. The testimony indicated that it was not explained to Pedersen that he could have a hearing before the Board with the right to counsel, cross-examination of witnesses and followed by findings of fact and conclusions of law. The fact that a person realizes that he should have a fair or an impartial hearing and even talks to a school director about speaking "his piece" does not mean that he understands the nature of or the procedures available at such a hearing and that he specifically, intentionally and knowingly wishes to give it up. The School District offered no evidence either directly or by cross-examination indicating that Henry Pedersen knew the type of hearing available and that he knowingly

intended to give up his right.

The District and Circuit Court ignored the fact that Pedersen did not knowingly and voluntarily give up his right to a due process hearing and entered judgment in favor of the School District because the statute creating Pedersen's property interest says that he is entitled to a hearing "if demanded". The Circuit Court and the District Court, however, ignored absolutely unequivocal state and federal law on the subject in so doing.

In dicta the Circuit Court found that an arbitration hearing with respect to a collective bargaining agreement satisfied due process. The hearing took place eight (8) months after the termination and was not held pursuant to the state law creating Pedersen's property interest. The Circuit Court decided the issue "[i]n view of the importance of the matter, and its recurring nature...." The Circuit Court also said: "there is no dispute that a post-termination proceeding

would be proper in the circumstances and should have been held within a reasonable time."

The Circuit Court never addressed whether the arbitration in the instant case was within a reasonable time. The District Court relied upon the decision in Barrentine v. Arkansas-Best Freight System, Inc., 101 U.S. 1437 (1981) to find that the labor arbitration could not suffice for a due process hearing under the circumstances because of the difference in the nature of the two proceedings. The Circuit Court disagreed. The Circuit Court also believed that to apply Barrentine would require holding the Pennsylvania Public Employee Relations Act unconstitutional. It is the position of Pedersen that the Circuit Court was incorrect since a due process hearing was a procedure to be afforded a dismissed public employee with a property interest regardless of what other remedy may be contracted for

between a public employee and the employer.

We assert that Pedersen was entitled to a Board hearing by virtue of the statute creating his property interest and that the arbitration was not sufficient because of its untimeliness, because it was not an attempt at a due process hearing, because it constituted the Union arguing on behalf of an ex-employee as against current employees and because it could not grant the full measure of relief. Concerning the importance of a rapid arbitration procedure see United Parcel Service Inc. v. Mitchell 101 S.Ct. 1559 (1981).

The statute creating the property interest required a hearing by the School Board. There is Supreme Court authority for the proposition that the forum designated by a statute creating a property interest must be utilized. The plurality opinion in Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633 (1974) held that "the very section of the statute which granted him that right [a

property interest in employment],... expressly provided also for the procedure by which 'cause' was to be determined...." at 416 U.S. 153, 94 S.Ct. 1643. The Opinion was announced by Mr. Justice Rehnquist which was joined in by the Chief Justice and Mr. Justice Stewart. Justices Powell and Blackmun who concurred in part, disagreed with the notion that the legislation creating the property interest could also define the procedural due process which must be afforded an individual upon a deprivation of his property interest. It should be noted that the Opinion of the two Justices who formed the plurality was based upon the fact that the legislation creating the property interest deprived a person of adequate procedural due process.

While the Legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize a deprivation of such an interest

once conferred, without appropriate procedural safeguards. At 416 U.S. 168, 94 S.Ct. 1650.

The reasoning of Justice Powell does not indicate that the statute creating a property interest cannot also define the forum which has the authority to cut off an individual's employment rights. Pedersen's position is buttressed by Justice Powell's statement that the terminated employee "is entitled to an opportunity to appear personally before the official having the authority to make or recommend the final decision.*** After removal, the employee receives a full evidentiary hearing and is awarded back pay if reinstated". 416 U.S. 171, 94 S.Ct. 1652. Arnett merely said that a pre-termination hearing was not required but the plurality was forged by three Justices who believe that the statute granting the property interest also controls the procedural due process and by one Justice who approved of a post-termination procedure which guaranteed a

decision by those in the equivalent position to the South Williamsport Area School Board. Mr. Justice White was the fifth Justice who made the Arnett Opinion possible and he disapproved of regulations which diluted the due process which had to be given upon termination of a property interest.

In the event that Arnett does not compel a hearing by the Board staff, we rely upon Barrentine. Arbitration was not recognized as being adequate in Barrentine for the following reason:

> Disputes arising under a collective bargaining agreement are processed by the employee's union rather than by the individual employee. The union's interest, and rightly so, is to maximize the benefits under the collective bargaining agreement to all employees rather than necessarily to strive to vindicate the rights of an individual member in a particular grievance. Given that obligation, a union may without breaching its duty of fair representation fail adequately to protect the employee's interest. (226a).

As the District Court noted Pedersen's

"right to maintain his job unless grounds for his removal are shown is an individual right and enforceable even if the circumstances were such that the Union could determine that his removal would not be inimical to the interests of other employees and might be beneficial to them." (226a). See also (229a) and (230a).

If the property interest created by §5-514 of the Pennsylvania School Code required a Board hearing as argued by Pedersen there is no need to address the arbitration matter. However if labor arbitration can be a viable alternative to procedural due process the question of timeliness and similarity of interest under Barrentine must be examined.

In Corrigan v. Donilon, 639 F.2d 834 (1st.Cir. 1980) appellants had been wrongfully terminated but were not required to undergo a hearing before the school board as ordered by the District Court. The Court noted that had appellants "been afforded a prompt hearing before the school board" there

would have been no due process violation. The board was required to follow state procedures even though a federal due process claim was at issue. At 837.

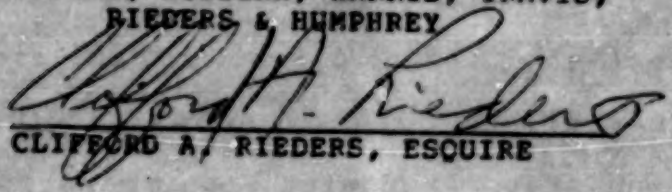
CONCLUSION

The jury found that Pedersen knew of his right to an impartial hearing but did not voluntarily and knowingly waive that right. The District Court entered judgment for Defendant because the state statute granting Pedersen his property interest said that he was entitled to a School Board hearing "if demanded". Although all applicable federal and state authority require notice of the opportunity of a hearing to the employee and in spite of a jury finding that the employee did not knowingly and voluntarily waive his right to a hearing defendants prevailed.

In a decision with far reaching implications the Circuit Court found that labor arbitration can suffice for a due

process hearing even when the arbitration was not intended as a due process hearing, was not performed by those in a position to hire and fire, was untimely, was not designated under the statute creating the property interest, and did not have the same interests at stake which would be involved in a proper due process hearing. We belive this was error and should be reviewed by the Supreme Court.

MURPHY, MUSSINA, HARRIS, TRAVIS, RIEDERS & HUMPHREY



CLIFFORD A. RIEDERS, ESQUIRE

CERTIFICATE OF SERVICE

AND NOW comes Clifford A. Rieders, Esquire, Attorney for Petitioners, and certifies that the within Petition for Writ of Certiorari was filed with the United States Supreme Court, One First Street, N.E., Washington, D. C. 20543, this 29th day of September, 1982, by first class mail.

He further certifies that a copy was served upon John Bonner, Esquire, 329 Market Street, Williamsport, PA 17701, this 29th day of September, 1982 by first class mail, postage prepaid.

MURPHY, MUSSINA, HARRIS, TRAVIS, RIEDERS & HUMPHREY

Clifford A. Rieders, Esquire

SWORN to and subscribed before me this 29 day of Sept., 1982.

Deborah A. Dougherty
Notary Public

My Commission Expires:

DEBORAH A. DOUGHERTY, Notary Public
Williamsport, Lycoming Co., Pa.
My Commission Expires January 10, 1983

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HENRY PEDERSEN, et al.: CIVIL NO. 80-0404

Plaintiff : Complaint filed 4/15/80

vs. : JUDGE MUIR

SOUTH WILLIAMSPORT AREA SCHOOL DISTRICT, :

Defendants :

ORDER
May 4, 1981

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On April 3, 1981, the Defendants moved for summary judgment on counts 1, 2, 6 and 7, the only counts remaining in this action, and supported the motion with documentary evidence and a brief filed the same day. The Plaintiffs filed a brief in opposition to the motion on April 16, 1981. The Defendants have chosen not to file a reply brief. Because of the decision in the case of Barrentine vs. Arkansas-Best Freight System, Inc., ___ U.S. ___, 49 U.S.L.W. 4347, announced on April 6, 1981, the Court concludes that the Defendants are not entitled to summary judgment as to Count 1 and that Mr. Pedersen's arbitration rights under his collective

bargaining agreement are irrelevant to that count. In addition, the Court will deny the Defendants' motion for summary judgment as to Counts 2, 6 and 7.

In its opinion of December 19, 1980, the Court held that Pedersen's procedural due process rights could be satisfied either by a hearing before the school board as contemplated by section 514 of the Public School Code of 1949, 24 P.S., section 5-514, or by a timely arbitration proceeding under the collective bargaining agreement. The Court adhered to this position in its opinion of March 26, 1981. This determination by the Court was based on its conclusion that an arbitration proceeding before an impartial arbitrator would provide Pedersen with the procedural due process rights to which he was entitled. Pedersen vs. South Williamsport Area School District, Civil No. 80-404, slip op. at 21 (M.D. Pa. March 26, 1981). Based on the Supreme Court's subsequent decision in Barrentine vs. Arkansas-Best Freight System, Inc., ___ U.S. ___, 49 U.S.L.W. 4347 (April 6, 1981), the Court now concludes that its determination on this point must be modified.

The question faced by the Supreme Court in Barrentine was whether an employee could maintain an action alleging a violation of the minimum wage provisions of the Fair Labor Standards Act, 20 U.S.C., section 201 et seq., after he had unsuccessfully submitted a wage claim based on the same underlying facts to a grievance procedure under his union's collective bargaining agreement. The Supreme Court held that he could maintain the action. In so holding, the Court emphasized the difference between contractual dispute resolution procedures and individual ones in a way that is applicable to this case.

Disputes arising under a collective bargaining agreement are processed by the employee's union rather than by the individual employee. The union's interest, and rightly so, is to maximize the benefits under the collective bargaining agreement to all employees rather than necessarily to strive to vindicate the rights of an individual mumber in a particular grievance. Given that obligation, a union may without breaching its duty of fair representation fail adequately to protect the

employee's interests. Barrentine vs. Arkansas-Best Freight System, Inc., ___ U.S. ___, ___, 49 U.S.L.W. 4347, 4351 (April 6, 1981).

Similar considerations are at play in this case. Pedersen had the right not to be deprived of his job without due process. A major aspect of his procedural right was his right to a hearing at which he could dispute the reasons for his firing. An essential element of that right is that the party advocating Mr. Pedersen's position owe allegiance only to him. This is because Mr. Pedersen's right to maintain his job unless grounds for his removal are shown is an individual right and enforceable even if the circumstances were such that the union could determine that his removal would not be inimical to the interests of other employees and might be beneficial to them. Since it is undisputed in this case that the union, rather than Mr. Pedersen, was responsible for the processing of the grievance and because the union did not have the same interest in the arbitration as did Mr. Pedersen, the arbitration proceeding, even if timely and properly

conducted was not sufficient to provide Mr. Pedersen with the process to which he was entitled.

Chung vs. Park. 514 F.2d 382 (3d Cir. 1975), is not inconsistent with this result but is supportive of it. While it is true that in Chung the Court of Appeals held that an arbitration proceeding was sufficient to vindicate the employee's due process rights, that arbitration proceeding differed in at least two material respects from the one afforded Pedersen. First, the decision to submit the dispute to arbitration was arrived at by agreement between the attorney general's office and counsel representing the employee. Second, the employee was represented at the arbitration hearing by counsel of his choice. In Chung, therefore, the employee was represented by an advocate who was concerned with the employee's interest. Such was not the case in Pedersen's arbitration.

It is undisputed that Mr. Pedersen did not receive a hearing before the Board until October 6, 1980. In its opinion of March 26,

1981, the Court held that that hearing had occurred too late as a matter of law to discharge the Defendants' obligation under the due process clause. There does exist, as the Court indicated in its prior opinions, an issue of material fact as to whether Mr. Pedersen knew of his right to a hearing and waived that right. For this reason, summary judgment may not be awarded to either party on Count 1.

Count 2 of the complaint attacks the substantive reasons for Pedersen's firing and alleges that he was fired for reasons violative of his First Amendment rights of expression and association. Although it is a close question, the Court concludes that issues of material fact exist as to the reason for Pedersen's firing.

The Defendants seek summary judgment on Counts 6 and 7 only on the basis that those counts may not stand if both counts 1 and 2 are dismissed. Since the Court concludes that neither party is entitled to summary judgment on Counts 1 and 2, the Court may not grant summary judgment on Counts 6 and 7 on the

basis of the Defendants' arguments.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The Defendants' motion for summary judgment with respect to Counts 1, 2, 6 and 7 is denied.

2. The only material facts in dispute with respect to liability under Count 1 are those relating to the question of whether Pedersen waived his right to a hearing before the board of school directors.

3. Paragraph 2 of the Court's order of March 26, 1981 is vacated.

MUIR, U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HENRY PEDERSEN, et al.,	:	CIVIL NO. 80-0404
Plaintiffs	:	JUDGE MUIR
vs.	:	
SOUTH WILLIAMSPORT AREA SCHOOL DISTRICT, et al.,	:	
Defendants	:	

ORDER
May 6, 1981

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On May 4, 1981, the Court issued an order in the above-captioned case that held that contractual remedies available to Pedersen to attack his discharge are irrelevant to his claim that he was discharged without due process of law. That order incorrectly stated that the Defendants have not filed a reply brief when in fact such a brief had been filed on April 24, 1981. The purpose of this order is to amend the Court's order of May 4, 1981 in order to discuss the issues raised in the Defendants' reply brief.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The Court's order of May 4, 1981 is amended by inserting the following on page 4 before the first full paragraph in that page:

"In their reply brief, the Defendants seek to distinguish Barrentine on the ground that Barrentine involved substantive rather than procedural rights. The Court recognizes that such was the case; however, the Supreme Court's discussion concerning the lack of a complete identity of interest between the individual employee and his union are equally are at issue.

"Board of Education vs. Philadelphia Federation of Teachers, 464 Pa. 92 (1975), relied on by the Defendants, and by the Court in its opinion of March 26, 1981, did not involve a case in which the employee sought to invoke his right to a hearing before the School Board and is for that reason not applicable in light of Barrentine. West Middlesex Area School District vs. Commonwealth, ___ Pa. Cmwlth., ___, 423 A.2d 781 (1980), also relied on by the Defendants, held that an unsuccessful hearing before the board did not preclude resort to arbitration by the employee. The issue in this case is not whether Pedersen could, if he chose to, pursue arbitration but whether he was entitled to a hearing before the board regardless of arbitration. West Middlesex is not relevant to that determination and if relevant it appears to give the employee the right to both forums at least as a matter of state law."

2. Page 1, paragraph 1 of the Court's order of May 4, 1981 is amended by deleting the third sentence and inserting the following:

"The Defendants filed a reply brief on

April 24, 1981."

MUIR, U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HENRY PEDERSEN, et al.,	:	CIVIL NO. 80-0404
Plaintiffs	:	Complaint filed 4/15/80
vs.	:	
SOUTH WILLIAMSPORT AREA SCHOOL DISTRICT, et al.,	:	JUDGE MUIR
Defendants	:	

ORDER
May 18, 1981

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On May 12, 1981 the jury found in answer to special verdict question #1 that in November 1979 Henry Pedersen knew that he had a right to ask for an impartial hearing before the Board of Directors of the South Williamsport Area School District concerning his termination. The jury also found that Mr. Pedersen did not voluntarily give up his right to such a hearing. On the basis of these answers, the Defendants moved for judgment in their favor. The Court declined to direct the entry of judgment at that time because it was of the view that it

would be more efficient to try the remaining issues in this case so that if the case were appealed and the Court of Appeals disagrees with this Court's legal determination, it could remand the case for the entry of the appropriate judgment based on the facts as found by the jury. The Court did, however, dismiss the case against the individual Defendants. On May 15, 1981, almost at the end of the rebuttal testimony on the issue then being tried as to whether the School Board would have discharged Pedersen had a hearing been held before the Board in November 1979, the Court granted the Defendant South Williamsport Area School District's motion for a mistrial. In light of this circumstance, the Court is of the view that rather than commence the trial again on the remaining issue or issues, it would be appropriate to enter judgment on the special verdict questions in favor of the Defendants.

Throughout this case, the Plaintiffs have argued that Mr. Pedersen's right to a hearing is governed by section 514 of the Pennsylvania School Code, 24 P.S., section 5-514. That section provides:

> The board of school directors in any school district . . . shall after due notice, giving the reasons therefor, and after hearing if demanded, have the right at any time to remove any of its officers, employes or appointees for incompetency, intemperance, neglect of duty, violation of any of the school laws of this Commonwealth or other improper conduct.

Section 514 does not impose on the board an obligation to provide a hearing unless one is demanded by the employee. It is the Court's view that this procedure complies with the Fourteenth Amendment's requirement as regards to due process. The Court has previously held that Mr. Pedersen was entitled to notice of his right to demand a hearing unless he knew of that right. The jury found that Mr. Pedersen knew of his right to ask for a school board hearing. It is undisputed that Mr. Pedersen did not request such a hearing. On this basis, the Court concludes that the Defendants are entitled to judgment in their favor.

The Court acknowledges that in prior opinions it has expressed the view that an additional question was one of voluntary waiver of a right to a hearing. This issue was

submitted to the jury with the approval of both parties. It is the Court's present view that as a matter of law the issue of a voluntary waiver is not a proper part of this case. Mr. Pedersen's right to a hearing before the board of school directors was not an absolute one which could only be waived by a knowing and intelligent waiver. His right to a hearing was conditioned on his having demanded one, provided, of course, that he had knowledge of that right. For example, had Mr. Pedersen been given proper notice of his right to demand a hearing and lost the letter or forgot to request the hearing, then there would be no due process violation on the ground of the board's failure to provide him with one. Similarly, since the jury has found that Mr. Pedersen knew of his right to ask for a hearing, his failure to ask for one, for whatever reasons, discharged the board of any obligation to provide one. This being the case all Defendants are entitled to judgment in their favor.

Prior to trial, the Plaintiffs abandoned

their claim that Mr. Pedersen was discharged for reasons violative of his First Amendment rights. In light of the Court's conclusion that Mr. Pedersen's due process rights were not violated, his and Ann Pedersen's claims for intentional infliction of emotional distress are subject to dismissal as well.

NOW, THEREFORE, IT IS ORDERED THAT:

The Clerk of Court shall prepare a form of judgment for the Court's approval in favor of the Defendants dismissing the Plaintiffs' complaint.

_____

MUIR, U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HENRY PEDERSEN, et al.,	:	CIVIL NO. 80-0404
Plaintiffs	:	Complaint filed 4/15/80
vs.	:	JUDGE MUIR
SOUTH WILLIAMSPORT AREA SCHOOL DISTRICT, et al.,	:	
Defendants	:	

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Malcolm Muir, United States District Court Judge, presiding, and the issues having been duly tried and the jury having duly rendered its Special Verdict,

It is Ordered and Adjudged

That the Plaintiffs take nothing, that the action be dismissed on the merits, and that the Defendants South Williamsport Area School District, et al., recover of the plaintiffs Henry Pedersen, et al, their costs of action.

Dated at Williamsport, Pennsylvania, this 18th day of May, 1981.

Donald R. Berry, Clerk of Court

by _____
Deputy Clerk

Approved:

_____
MUIR, U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2093 and 81-2094

HENRY PEDERSEN and ANN PEDERSEN, his wife
Appellants in 81-2093

v.

SOUTH WILLIAMSPORT AREA SCHOOL DISTRICT,
EDWARD A. VOLLBRECHT, ROBERT G. LESHER,
FRED AGNONI, DANNY REESER
and GEORGE MICHAL,

South Williamsport Area School District,
Appellants in 81-2094

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued March 4, 1982

Before: HUNTER, WEIS and HIGGINBOTHAM,
Circuit Judges

Opinion filed April 30, 1982

Clifford A. Rieders, Esquire
(ARGUED)
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Williamsport Area
School District

OPINION OF THE COURT

WEIS, Circuit Judge.

A discharged school district employee claims a denial of due process because he was not advised of his right to a hearing before the School Board. The district court found that the employee knew of this right and, therefore, could not recover damages simply because he lacked formal notice. We agree and also hold that a timely arbitration under the collective bargaining agreement in effect at the time of the discharge was a valid alternative to a Board hearing and satisfies due process requirements.

Plaintiff Pedersen's suit for damages against South Williamsport Area School District, its Board members and several employees, challenged his discharge on a variety of state and federal grounds, including defamation,

abuse of process, breach of contract and lack of due process. The complaint alleged liability under 42 U.S.C., section 1983 and contained pendent state law claims as well. Most of the counts were dismissed before trial and the case was tried to a jury in the district court on the question of procedural due process. Based on the jury's answer to a special interrogatory that Pedersen knew of his right to a hearing, the district court entered judgment for the defendants.

Pedersen had been a maintenance employee of the School District for several years when, in November of 1979, it charged him with theft, unauthorized use of school property, insubordination and other derelictions. He was given notice of his alleged misconduct and was represented by a union official at a hearing before the School Superintendent on November 15, 1979. The Superintendent recommended Pedersen's discharge and, in an executive session on November 19, 1979, the Board voted to terminate his services.

Pedersen did not request a hearing before

the Board. Instead, he requested his union, the American Federation of State, County and Municipal Employees, to grieve his discharge and ask for reinstatement. The procedures in the collective bargaining agreement were followed through to arbitration under the auspices of the American Arbitration Association. The arbitrator returned a finding against Pedersen in July of 1980.

In April of 1980, before the arbitration had been completed, Pedersen filed this suit in the United States Court for the Middle District of Pennsylvania. Thereafter, in October of 1980, the Board held a hearing on Pedersen's discharge and reaffirmed its earlier action.

In winnowing out the various claims, the district court granted summary judgment for the defendants in some instances and dismissed other counts. At one point, the court believed that the grievance procedure did satisfy due process, but that the plaintiff should nevertheless be given the opportunity to present evidence on the reason the arbitration hearing was not held until July 1980. Henry Pedersen

vs. South Williamsport Area School District, No. 80-0404 (M.D. Pa. March 26, 1981). After the Supreme Court filed its opinion in Barrentine vs. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981), however, the district court reconsidered its position and concluded that the arbitration proceeding, even if timely, did not meet due process requirements. Henry Pedersen vs. South Williamsport Area School District, No. 80-0404 (M.D. Pa. May 4, 1981).

The case then proceeded to the liability stage of a bifurcated trial. The jury determined, by its answer to special interrogatories, that Pedersen knew about the statute entitling him to ask for a hearing before the School Board, but that he did not voluntarily give up that right. During the damages phase of the trial, a mistrial was granted on an evidentiary matter. The court then entered judgment for the defendants, finding that Pedersen did not ask for a hearing and, therefore, the Board was not required to conduct one. Since Pedersen was aware of his statutory rights, the court held, the Board had no

obligation to give him formal notice.

Pedersen appeals the due process issue, contending that the court erred in disregarding the jury's finding that he did not voluntarily waive his hearing before the Board. He also challenges the court's declaration of a mistrial. The School Board cross-appeals the district court ruling that arbitration did not fulfill the requirements for due process.

The parties agree that Pedersen's employment by the School District was a property interest which could not be taken from him without due process. The pertinent provision of the Pennsylvania School Code provides:

> "The Board of School Directors in any school district . . . shall, after due notice, giving the reasons therefore, and after hearing if demanded, have the right at any time to remove any of its . . . employees . . . for incompetency, intemperance, neglect of duty, violation of any of the school laws . . . or other improper conduct."

PA. STAT. ANN. Tit. 24, section 5-514 (Purdon 1962). Pedersen had a pre-termination hearing before the Superintendent and at that time was advised of the charges against him. He also had notice that the Superintendent was

recommending dismissal. It is therefore only the third requirement - a hearing before the Board - that plaintiff contends was denied him and for which he seeks recompense.

Implicit in the district court's decision, and not contested by the plaintiff, is that the statutory provision for a hearing before the Board meets federal due process standards.[1] We agree with the district court that Pedersen was not entitled to damages simply because there had not been a hearing before the School Board. The statute is clear on its face that a hearing must be demanded by the employee before the Board is under an obligation to provide one.

[1]The district court also found that the hearing held by the School Board in October of 1980, six months after this suit was commenced, was untimely and tainted by the fact that the members were defendants in this civil rights proceeding. Further, one of the Board members had preferred criminal charges against Pedersen. We need not discuss these issues in view of our disposition of the case, nor do we decide whether a hearing to "moot-out" the lawsuit is ineffective to satisfy the claim of due process denial. Cf. Carey vs. Piphus, 435 U.S. 247 (1978); Wilson vs. Taylor, 658 F.2d 1021, 1031-34 (5th Cir. 1981); DiLuigi vs. Kafkalas, 584 F.2d 22, 27 n. 7 (3rd Cir. 1978), cert. denied, 440 U.S. 959 (1979).

There is ample support for the jury's finding that Pedersen was aware of his right to present his case to the Board. Testimony established that his union representative advised him that he had a right to such a hearing, and his attorney did likewise. Pedersen chose instead to file a grievance and utilize the procedure set out in the collective bargaining agreement. In these circumstances, to hold that the Board is liable for damages because it did not give Pedersen formal notice of what he already knew would be indefensible.

The jury's finding that Pedersen did not voluntarily waive his right to appear before the Board is puzzling and we agree with the district court that the finding is irrelevant. There is nothing to suggest that the Board in any way inhibited Pedersen from requesting a hearing. Since Plaintiff did not establish an evidentiary basis for liability against the Board or its members, we will affirm the judgment of the district court.

We differ, however, with the district court's conclusion that the arbitration

proceedings did not provide due process to plaintiff. In view of the importance of the matter, and its recurring nature, we believe it appropriate to discuss the issue. We have had the benefit of briefing and argument by the parties on the point.

A few years after the Pennsylvania School Code came into effect, the legislature enacted the Pennsylvania Public Employee Relations Act (PERA) PA. STAT. ANN. tit. 43, section 1101. 201 et seq. (Purdon 1981). This statute permits collective bargaining between public agencies and their employees and provides that "[a]rbitration of disputes or grievances arising out of the interpretation of the provisions of a collective bargaining agreement is mandatory." Id. at section 1101.903. The Pennsylvania Supreme Court has construed this statute, together with the School Code's hearing provision, in Board of Education vs. Philadelphia Federation of Teachers, 464 Pa. 92, 346 A.2d 35 (1975). In that case, the court held that section 5-514 of the School Code does not preclude a school district from arbitrating grievances arising out

of the discharge of a non-tenured teacher. Justice Roberts wrote, "The General Assembly, far from forbidding arbitration of disputes arising out of a collective bargaining agreement, expressly commands it in section 903 of the PERA . . ." 346 A.2d at 39. The court pointed out that, because of the possibility of bias on the part of the school board, arbitration offers employees the advantage of a more impartial adjudicator.

In the context of a discharge dispute, the state court interpreted "just cause" under the collective bargaining agreement as being either co-extensive with the statutory grounds or, if less restrictive, as acceptable to the employee in exchange for the procedural advantages of arbitration. In either event, arbitration is not an impermissible infringement on the Board's responsibility and powers.

In Pittsburgh Joint Collective Bargaining Committee vs. Pittsburgh, 481 Pa. 66, 391 A.2d 1318 (1978), the court again approved arbitration as a means of promoting "harmonious relationships between the public employer and

employee." 391 A.2d 1322. Indeed, the court emphasized that grievance arbitration "is even more supportive of a favorable employment climate where [it] arises from the good faith bargaining of the parties rather than being required by statute." Id. State law, therefore, establishes that arbitration in cases similar to the one at hand is the preferred method of resolution.

The plaintiff, however, while relying upon state law to establish his property right, looks to federal law to define procedural due process. In Logan vs. Zimmerman Brush Co., ___ U.S. ___, 50 U.S.L.W. 4247 (Feb. 24, 1982) the United States Supreme Court observed that while a state may have specified procedures that it deems adequate, minimum due process standards are a matter of federal law. If a hearing is required, its timing and nature will depend on an appropriate accommodation of competing interests, including the importance of the private concern, the finality of deprivation, and the likelihood of governmental error. See Mathews vs. Eldridge, 424 U.S. 319 (1976).

Since all of these factors are implicated here, some type of hearing is unquestionably required. There is no dispute that a post-termination proceeding would be proper in the circumstances and should have been held within a reasonable time. What is at issue is whether arbitration meets constitutional minimum requirements. In this connection, the Supreme Court in Logan said that what the Fourteenth Amendment does require is an opportunity granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case. Logan vs. Zimmerman Brush Co., 50 U.S.L.W. at 4251.

As the district court's opinion of March 26, 1981, points out, proceedings before the impartial arbitrator enabled Pendersen to confront and cross-examine the witnesses against him, as well as offer evidence on his own behalf. In addition, the arbitrator submitted a written report, giving his conclusions and the supporting evidence. Although Pedersen later complained that he received short notice of the hearing date, the union representative

failed to request a postponement, and his lawyer was unable to attend, plaintiff did not contend that any of these alleged deficiencies were caused by the defendants.

Except for the unexplained delay in scheduling the arbitration hearing, the court would have granted summary judgment at that time on the due process issue. As the court reasoned, either the remedy of a hearing before the Board as provided by section 5-514, or the arbitrator's hearing, sufficed to meet Fourteenth Amendment standards.

In view of Barrentine, however, the district judge reconsidered his decision. Barrentine held that an employee, whose overtime payment grievance was denied in a collective bargaining arbitration proceeding, was nevertheless free to bring suit on the same facts in federal court under the Fair Labor Standards Act. The Court said that the substantive rights granted employees under the Act were not waivable, could not be abridged by a collective bargaining agreement, and were intended by Congress to be brought in court. Moreover, because of the

technical nature of the statute, non-lawyer arbitrators might not be competent to decide the legal questions presented in such disputes. Finally, the court noted that a union representing an individual might be required, out of interest for its membership at large, to sacrifice the individual's rights under the statute.

The considerations underlying Barrentine are substantially different than those present in the case at bar. Here the rights at stake are procedural, not substantive.[2] They are waivable and there is no Congressional policy requiring state employment controversies to be resolved in a judicial forum. The issues in a discharge dispute are neither technical nor complex and are resolved in numerous arbitration cases annually.

Although employees in private industry are not entitled to Fourteenth Amendment due process rights, it is noteworthy that most of the

[2]We discuss only the procedural phases of Barrentine because its res judicata aspects are not pertinent here.

discharges by companies where unions represent employees are resolved by arbitration. Indeed, it is the expressed national policy to encourage extra-judicial remedies in controversies of that nature. See Steelworkers vs. Warrior & Gulf Co., 363 U.S. 574 (1960).

Pennsylvania has adopted arbitration as its preferred dispute resolution method for governmental subdivisions and their employees. To apply Barrentine's holding to this case would require us to declare the Pennsylvania Public Employee Relations Act unconstitutional. Although we are not bound by a state's provisions on due process, we should not lightly override a policy adopted by its legislature and approved by its supreme court. The test is not whether the federal court could design a better scheme, but whether the state's procedures cross the threshold of minimum guarantees. Rennie vs. Klein, 653 F.2d 836 (3d Cir.) (in banc), cert. pending ___ U.S. ___ (1981)(No. 81-5534).

The district court was concerned that one of the Barrentine considerations - that the

union might sacrifice the interest of an individual member for that of the group - could also affect arbitration under PERA. Such a conflict is not present here, and we are not convinced that the remote chance that one might exist at some time is enough to make the Pennsylvania procedure unconstitutional. If a claimant feels that his interests might be jeopardized by conflicting union obligations, he can choose a Board hearing instead of arbitration.

Possible internal union conflict was only one of the many factors listed in Barrentine, and it is noteworthy that this potential weakness has not prevented arbitration from gaining widespread acceptance in private industry. From the standpoint of the employee, a job is equally important whether the employer is a governmental entity or otherwise, and the loss is equally serious. The widespread use of arbitration in the private sector furnishes some idea of what many people regard as a fair method of resolving a dispute. Essentially, fundamental fairness is what due process means.

Mullane vs. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

We are convinced that the district court's initial impression was correct and that it later gave an interpretation to Barrentine not intended by the Supreme Court. As we read that opinion, the Court excluded arbitration only when a narrow class of specific substantive rights were at stake. Those circumstances are not present here and we are persuaded that arbitration under PERA satisfies procedural due process.

Accordingly, the judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2093/4

PEDERSEN, HENRY and PEDERSEN, ANN, his wife,
Appellants in No. 81-2093

vs.

SOUTH WILLIAMSPORT AREA SCHOOL DISTRICT;
VOLLBRECHT, EDWARD A.; LESHER, ROBERT G.;
AGNONI, FRED; RESSER, DANNY; MICHAEL, GEORGE

SOUTH WILLIAMSPORT AREA SCHOOL DISTRICT,
Appellants in No. 81-2094

(D.C. Civil No. 80-0404)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: HUNTER, WEIS and HIGGINBOTHAM,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel on March 4, 1982.

On considerations whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court, entered May 4, 6 and 18, 1981 be, and the same are hereby

affirmed. Costs taxed against appellant(s) in each case.

ATTEST:

Chief Deputy Clerk

April 30, 1982

Certified as a true copy and issued in lieu of a formal mandate on June 17,

Test:

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit

Costs taxed in favor of appellee in No. 81-2093. South Williamsport Area School District as follows:

Appendix.....	$337.00
Brief.....	80.55
TOTAL	$417.55

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2093/4

HENRY PEDERSEN and ANN PEDERSEN, his wife,
Appellants in 81-2093

vs.

SOUTH WILLIAMSPORT AREA SCHOOL DISTRICT, et al.
Appellants in 81-2094

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, HUNTER, WEIS, HIGGINBOTHAN and BECKER, Circuit Judges.*

The petition for rehearing filed by

HENRY PEDERSEN and ANN PEDERSEN, his wife,
Appellants in 81-2093

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

*Honorable Leonard I. Garth and Honorable Dolores K. Sloviter did not participate in the consideration of this matter.

By the Court,

_____
Judge

Dated: June 9, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 81-2094

PEDERSEN, Henry and PEDERSEN, Ann, his wife

vs.

SOUTH WILLIAMSPORT AREA SCHOOL DISTRICT; VOLLBRECHT, Edward A.; LESHER, Robert G.; AGNONI, Fred; RESSER, Danny; MICHAEL, George

South Williamsport Area School District,

Appellant

Present: HUNTER, WEIS and HIGGINBOTHAM, Circuit Judges.

O R D E R

It is ORDERED that the judgment in this case be amended to read, "Each party shall bear its own costs."

It is FURTHER ORDERED that the provision as to costs in No. 81-2093 shall not be affected.

BY THE COURT,

Circuit Judge

Dated: June 9, 1982

POINT FOR CHARGE NO. 1

Mr. Pedersen's complaint in this case claims that the actions of the South Williamsport Area School District in terminating Mr. Pedersen deprived him of his right to property, which was his right to work, without due process of law in violation of the Fourteenth Amendment to the United States Constitution. When the Government acts to take away a property right, it must give notice and an opportunity to be heard after the termination.

(Form used in Ross vs. Pennsylvania State University and Ryan vs. Mansfield State College.

POINT FOR CHARGE NO. 2

In various pre-trial proceedings in this case the Court has made rulings which have substantially limited the scope of the trial.

"Pedersen had the right not to be deprived of his job without due process. A major aspect of his procedural right was his right to a hearing at which he could dispute the reasons for his firing."

(Pedersen vs. South Williamsport Area School District, et al., No. 80-0404, slip opinion filed May 4, 1981.)

POINT FOR CHARGE NO. 3

In this case there was no timely due process hearing before the Board of Directors of the South Williamsport Area School District.

(Pedersen vs. South Williamsport Area School District, et al., No. 80-0404, slip opinion filed October 6, 1980 and May 4, 1981)

POINT FOR CHARGE NO. 4

There are different ways in which a hearing can be set up for a person who has job tenure such as Mr. Pedersen but in this case there is a specific Pennsylvania state law on the subject.

"The Board of School Directors in any School District . . . shall after due notice, giving the reasons therefore, and after hearing . . . have the right at any time to remove any of its . . . employees . . . for incompetency, intemperance, neglect of duty, violation of any of the school laws of this Commonwealth, or other improper conduct."

(Pedersen vs. South Williamsport Area School District, et al., No. 80-0404, slip opinions May 4, 1981 and May 6, 1981; Ross vs. Pennsylvania State University and 24 P.S., section 5-514; Simineo vs. School District No. 16, 594 F.2d 1353 (10th Cir. 1979).

POINT FOR CHARGE NO. 7

The issue you are trying at this time is whether Mr. Pedersen waived his right to a hearing.

"State law required the Board to notify Pedersen of his right to demand a hearing. *** More important, however, is that such notice is required as a matter of federal law. *** . . . an employee in Mr. Pedersen's position should not be expected to investigate Title IV of Purdon Statutes to determine if he has a right to a hearing." The Court has decided previously in this case that Mr. Pedersen did not receive notice "reasonably calculated 'to inform Pedersen of his right to a hearing.'"

Such notice was not necessary, however, if Pedersen knew of his right to demand a hearing.

(Pedersen vs. South Williamsport Area School District, et al., No. 80-0404, slip opinion filed December 19, 1980; Swartley vs. Norristown Area School District, ___ Pa. Cmwlth. ___, 414 A.2d 153 (1980; Memphis

Light, Gas & Water Div. vs. Craft, 436 U.S. 1, 15 (1978).

SUPPLEMENTAL POINT FOR CHARGE NO. 1

There was testimony in this case related to a termination and reinstatement of Mr. Pedersen in 1975, to an arbitration proceeding which began when Mr. Pedersen was terminated in November of 1979 and to some kind of proceeding before Dr. Vollbrecht on November 15, 1979. You are not to consider those matters in your deliberations. The only question before you is whether Mr. Pedersen was aware of his right to a School Board hearing and knowingly, voluntarily and intelligently waived that right. There has been no evidence in this case that anything which occurred during 1975, at Dr. Vollbrecht's meeting or during the arbitration would have informed Mr. Pedersen of his rights to a Board hearing and likewise nothing happened at those proceedings to indicate that Mr. Pedersen waived his rights.

POINT FOR CHARGE NO. 13.1
ALTERNATIVE FOR PREVIOUS POINT FOR CHARGE

You can find that Mr. Pedersen waived his right to a hearing but only upon certain specified conditions. There is a strong presumption against the waiver of a constitutional right, and waiver must be shown by "clear and positive" proof. The party claiming waiver has a "heavy burden" to rebut the presumption against waivers. Waivers will not be found in circumstances which fall short of being "clear and compelling". Furthermore, a waiver must be intelligent and knowing. Only a known right or privilege may be waived. There must be an intentional relinquishment of a known right or privilege and the Courts have been consistently unwilling to infer a waiver of a right not clearly spelled out at the time of the alleged waiver. In other words a person cannot waive a right to a hearing unless he knew of his right to demand the particular kind of hearing available. A right cannot be waived before it is known to exist.

The facts and circumstances of each case are to be considered, to include the background, experience and conduct of the party alleged to have waived his right.

(Pedersen vs. South Williamsport Area School District, et al., slip opinion filed April 15, 1980; Brookhart vs. Janis, 384 U.S. 1.)

POINT FOR CHARGE NO. 14

To reiterate there can be no waiver of a constitutional right unless it "be voluntary, knowing and intelligently made, *** or 'an intentional relinquishment or abandonment of a known right or privilege.'" The Courts "do not presume acquiescence in the loss of fundamental rights . . . ."

(D. H. Overmayer Company vs. Frick, supra, at 405 U.S. 186-187, 92 S. Ct. 782).

POINT FOR CHARGE NO. 15

Defendant must prove by a preponderance of the evidence that Mr. Pedersen knew of his right to an impartial hearing such as I described to you and that he waived his right to a School Board hearing. If you find that Defendants did not carry their burden then you cannot find waiver.

(See Points for Charge Nos. 4-12).

1. In November 1979 did Henry Pedersen know that he had the right to ask for an impartial hearing before the Board of Directors of the South Williamsport Area School District concerning his termination?

Answer: Yes X

No_____

(Check One)

Each juror who agrees sign here:

Theodore R. Toot	Janice L. Walton
Henry M. Bartlett	Edward D. Collins
Marian B. Bender	Madeline B. Smith
Beverly M. Smith	Victor J. Montefusco
Robert P. Friese	J. Harold Clark

INSTRUCTIONS:

(a) The burden of proof is on Defendant South Williamsport Area School District to prove a "yes" answer.

(b) If the answer to this question is yes, go to the next question.

(c) If the answer to this question is no, return to Court.

2. If your answer to the previous question is yes, did Henry Pedersen voluntarily give up his right to such a hearing by the Board of Directors of the South Williamsport Area School District?

Answer: Yes_____
No __X__
(Check One)

Each juror who agrees sign here:

Theodore R. Toot	Janice L. Walton
Henry M. Bartlett	Edward D. Collins
Marian B. Bender	Madeline B. Smith
Beverly M. Smith	Victor J. Montefusco
Robert P. Friese	J. Harold Clark

INSTRUCTIONS:

(a) The burden of proof is on Defendant South Williamsport Area School District to prove a "yes" answer.

(b) After answering this question, return to Court.

82-569

Office - Supreme Court, U.S.
FILED
OCT 12 1982
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____, Term 19 ____

HENRY PEDERSEN and
ANN PEDERSEN, his wife
Petitioners

vs.

SOUTH WILLIAMSPORT AREA
SCHOOL DISTRICT, ET AL.,
Respondents

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The District Court on August 8, 1980, denied Defendants Motion to Dismiss and or Stay Pending Completion of Arbitration Proceedings pursuant to a collective bargaining agreement between the School District and the Union to which Henry Pedersen belonged. (Appellate Record 12(a)-14(a)).

Cross-Motions for Summary Judgment were filed and the District Court dismissed Count IV of the Complaint (abuse of process and wrongful use of process) and part of Count V (interference with contractural relations) and in all other respects denied the motions. (Appellate Record 167(a)-186(a)).

Each party again filed Motions for Summary Judgment and for Reconsideration of the prior opinions and orders and the District Court on March 26, 1981, held the grievance-arbitration procedure could satisfy due process and issues for trial under Count I (procedural due process)

were the reasons for the delay in the arbitration hearing and whether Henry Pedersen waived his right to a school board hearing. The District Court also dismissed Count III (defamation) and Count V (Breach of Contract). (Appellate Record 187(a)-223(a)).

On May 4, 1981, the District Court reversed its position and held in light of Barrantine v. Arkansas - Best Freight System, Inc., ____U.S. ____, 101 Supreme Court 1437 (1981) decided April 6, 1981 that a grievance arbitration procedure could not satisfy due process (Petitioners Brief 1 (a) - 8 (a)).

On May 18, 1981, the District Court, upon consideration of the School District's motion for entry of judgment on the special verdict dismissed the complaint on the merits holding under Pennsylvania School Code:

> "[S]ince the jury has found that Mr. Pedersen knew of his right to ask for a hearing, his failure to ask for one, for whatever reasons, discharged the board of any obligations to provide one. This being the case, all Defendants are en-

titled to judgment in their favor."
(Petitioners Brief-13 (a)).

The Unites States Court of Appeals for the Third Circuit affirmed the District Court in an opinion reported at 677 F. 2d, 312 (3rd Cir. 1982) (Petitioners' Brief 15(a) - 37(a)).

CONSTITUTIONAL PROVISIONS STATUTES AND REGULATIONS WHICH THE CASE INVOLVES

1. Pennsylvania Public Employees Relations Act Arbitration of disputes or grievances arising out of the interputation of the provisions of a collective gargaining agreement is mandatory. The procedure to be adopted is a proper subject of bargaining with the proviso that the final step shall provide for a bending decision by an arbitrator or a tri-partite board of arbitrators as the parties may agree. 43 P.S. § 1101.903

STATEMENT OF THE CASE

Henry Pedersen was an employee of the school district from December 27, 1971, until his discharge for theft and unauthorized use of school district property on November 19, 1979. During the course of his employment, Henry Pedersen was a member of the American Federation of State, County and Municipal Employees (union). At the time of his discharge, there was a collective bargaining agreement between the union and school district and work rules governing the conduct of employees. (Work Rules, 6(a) - 12(a)). On November 9, 1979, Henry Pedersen received a notice from the school district that he was being suspended for five (5) days without pay and a hearing before the school district's superintendent (Defendant, Dr. Edward A. Vollbrecht) would be held within five (5) days. (Appellate Record-16(a)). The notice was the result of Pedersen's co-employee (Defendant Danny Reaser)

reporting to the assistant to the superintendent (Defendant-Robert G. Lesher) of various acts of theft committed by Pedersen, himself and a third employee, who also was discharged, and unauthorized use of school district property. Reaser was prompted to report this when Pedersen threatened Reaser that if they got caught, Reaser could go to jail, but Pedersen and the other employee, could make restitution (Reaser's Testimony (12(a)). On November 12, 1979, Pedersen was given a notice setting forth the acts of misconduct with which he had been charged and also advising him of a hearing before the superintendent and outlining his rights at the hearing. (Appellate Record-17(a)-18(a)).

The work rules provide:

> "Written notice and a five (5) day suspension without pay, also a notice of intent to discharge at the end of the five (5) day suspension, subject to review by the school board. A hearing on the charges for dismissal to be held with the School Superintendent

during the five (5) day suspension". (Work Rules, 6(a)-12(a)).

A pre-termination hearing was held on November 15, 1979, before the superintendent. Pedersen was represented by John Hatfield, an experienced union representative. At the hearing, Reaser and Defendant George C. Michaels, another co-employee testified regarding the various acts of misconduct. At the conclusion of the hearing, the Superintendent, took a recess in order to review the testimony. After the recess he announced his decision that he would recommend to the Board of School Directors that Pedersen be discharged. The Board of School Directors, at their November 19, 1979 meeting, voted to discharge Pedersen.

Two days prior to the hearing, Pedersen met with Hatfield to review the case and discussed whether to file a grievance and proceed to arbitration or to request a hearing before the School Board of Directors. Hatfield told Pedersen that while he had a right to go to the School Board and ask for a hearing, he

recommended the arbitration procedure since he did not believe the school board would override the administration. (Hatfield's Testimony, 13(a) - 18(a)).

On November 15, 1979, Pedersen submitted a grievance to be filed by his union president and on November 20, 1979, asked him to file the grievance. (Pedersen's Testimony, 18(a)-21(a)). A few days later, he discovered the union president had not filed the grievance and he mailed it to the school district by certified mail around November 27, 1979. (Pedersen's Testimony 18(a) -21(a)). The grievance was stamped received by the school district on December 3, 1979. (Appellate Record-78(a)). Pedersen also contacted an attorney concerning his rights and was advised of his right to a school board hearing. (Pedersen's Testimony, 18(a)-21(a)). However, he never requested a hearing.

The grievance procedure consists of four (4) steps, the first three being reviews by the immediate supervisor, the financial secretary and

finally the superintendent. The fourth step is binding arbitration through the American Arbitrators Association. The grievance was denied at the third step on December 31, 1979, (Appellate Record 79(a)), and on January 3, 1980, the union advised the school district it was submitting the matter to arbitration. (Appelate Record 80(a)). On February 21, 1980, a conference was held between a union representative, the superintendent and school district solicitor in an attempt to resolve the matter. The settlement conference was unsuccessful and on March 24, 1980, the union sought and received the school district's concurrence to submit the matter to arbitration.

On April 9, 1980, the union requested the American Arbitration Association to submit a list of Arbitrators. (Appellate Record 81(a)). Two days later, the American Arbitration Association provided a list of arbitrators to the union and school district. (Appellate Record 82(a)). On April 17, 1980, the school district sent its list of acceptable arbitrators to the American Arbitration

Association. (Appellate Record 83(a)). On May 1, 1980, the American Arbitration Association reported it had not received the union's list of arbitrators. (Appellate Record 86(a)). On May 11, 1980, it reported that the lists submitted failed to produce a mutually acceptable arbitrator and a supplemental list was forwarded to the union and school district. (Appellate Record 87(a)). On May 19, 1980, the school district submitted its list of acceptable arbitrators (Appellate Record 88(a)),and on June 2, 1980, the American Arbitration Association advised that the parties had selected Mr. Peter Florey as the arbitrator and he was available for a hearing on July 22, 1980, (Appellate Record 91(a)).

The hearing was held on July 22, 1980, and the arbitrator denied the grievances finding:

> Turning to the record, it supports the charges of the informant. There was no apparent reason why Roaser had to step forward and level his accusation against Pedersen and McClosky and to implicate himself. I believe that no promise was extended to him by the District for turning in his two buddies and that he fully accepted the risk of being discharged himself.

He found himself in an untenable position: he was being blackmailed to support the machinations of Pedersen and McClosky, and was pitted against the two other guys, who, by age and personality, were much more akin to him than Pedersen and McClosky.

It may be true that the items taken by the two grievants were of no great value when compared to embezzlements of white collar criminals, who take millions with impunity. Also, the use of district facilities for the personal benefit of employees may have been a widely accepted practice at one time. However, a new wind blew when Agnoni took over the shop. After all, an employer has the right to set matters straight with proper warning. Moreover, the record does not implicate Reish, and Pedersen and McClosky apparently started their spree when Lesher put them in the driver's seat. Even if any transgressions prior to Agnoni's arrival are set aside, it is still clear that the two grievants viewed the new supervisor with great disdain and set out to make his life miserable and to flaunt his authority in a systematic fashion.

By their actions, the grievants have effectively destroyed any basis for a future employment relationship with the district and even a lengthy suspension would not correct the situation.

In light of the whole record, their grievances cannot be sustained. (Arbitrator's Decision, 23(a) - 45(a)).

Neither Pedersen nor his union appealed from the arbitrator's decision.

A hearing before the Board of School Directors was held on October 6, 1980, and on October 30, 1980, the directors voted to uphold the discharge based upon Pedersen's removal of school district property without authorization and unauthorized use of school district vehicles. An appeal by Pedersen is presently pending before the Court of Common Pleas of Lycoming County, Pennsylvania.

ARGUMENT

I

THE COURT OF APPEALS WAS CORRECT IN AFFIRMING THE DISTRICT COURT'S ENTRY OF JUDGMENT FOR RESPONDENTS WHERE THE JURY FOUND PETITIONER KNEW OF HIS RIGHT TO HEARING BUT DID NOT WAIVE HIS RIGHT TO SUCH A HEARING.

The issues presented to the jury during the first phase of the trial were (1) whether Pedersen knew of his right to a hearing before the Board of School Directors and (2) whether Pedersen waived his right to such a hearing. It is the school district's position that Pedersen was not entitled to a hearing before the Board of School Directors for the reasons set forth in Argument II.

The Pennsylvania Code, 24 P.S. §5-514 provides in part:

> "The board of school directors in any school district....shall after due notice, giving the reasons therefore, and after hearing if demanded, have the right at anytime to remove any of its officers, employees, or appointees

for incompetency, intemperance, neglect of duty, violation of any of the school laws of this Commonwealth, or other improper conduct."

The statute clearly provides that the employee must request a hearing before the Board is required to hold one. This statute comports with due process as the state may erect reasonable procedural requirements for triggering the right to an adjudication. LOGAN V. ZIMMERMAN BRUSH COMPANY, ____ U.S. _____, 102 S. Ct. 1148, 1158 (1982).

The District Court, in its December 19, 1980, Order denying Pedersen's Motion for Partial Summary Judgment held that notice of a right to a hearing is not necessary, if Pedersen knew of his right to demand a hearing. (Appellate Record 171(a)). The issue was submitted to the jury on this basis, without objection by Petitioner, and there was sufficient evidence to support their special verdict. John Hatfield, Pedersen's union representative, told Pedersen on November 13, 1979, that he had a right to request a school board hearing. He stated he recommended to Pedersen that it would be better to go the arbitration route because he did not believe the school board of directors

would rule against the administration. (Hatfield's Testimony, 13(a) - 18(a)). Furthermore, at the time of their meeting, Pedersen brought with him provisions of the Pennsylvania School Code. (Hatfield's Testimony, 13(a)-18(a)). Pedersen testified that he met with an attorney towards the end of November, 1979, and was advised of his rights to a hearing before the board of school directors. Pedersen elected not to request a hearing. As was stated by the Court of Appeals: "In these circumstances to hold that the Board is liable for damages because it did not give Pedersen formal notice of what he already knew would be indefensible." (Petitioners' Brief 23(a)).

Plaintiff's reliance upon Swartley v. Norristown Area School District, 414 A2d 153 (Pa. Commonwealth 1980) is misplaced. Swartley did not involve a question of whether the employee's due process rights were violated, but rather whether proper statutory procedures under state law were followed. Not every violation of state law gives a person a claim under federal law.

> "[T]he Plaintiffs on appeal appear to have taken the position that a federal constitutional violation follows necessarily from the fact that the individual defendants authorized municipal actions that were contrary to state law. Such a position is quite simply wrong." (Emphasis added) Ontega Cabrera v. Municipality of Babamon 562, F2d 91, 98 (1st Cir. 1977).

Here the alleged failure of state law was to advise Pedersen of his right to request a hearing before the school board of directors. The District Court of Appeals correctly held that this violation of state law would not rise to a violation of Pedersen's constitutional rights if he knew of his right to request such a hearing. Memphis Light, Gas and Water Division V. Craft, 436, U.S. 1, 98 S. Ct. 1554 (1978), does not compel a contrary result. The jury having found, on sufficient evidence, that he knew of his right to hearing before the board of school directors accordingly, there was no violation of his constitutional rights and therefore, judgment was appropriately entered on the verdict in favor of the school district and its employees.

Since under state law, the right to a school board of director's hearing is conditional, i.e., the

employee has to request the hearing, the second issue presented to the jury was unnecessary under the facts of this case. The employee need not waive the right to such a hearing in the constitutional sense, but rather not exercise his right to a hearing. Even though Pedersen knew of his right to a hearing before the board of school directors, he did not exercise this right and request a hearing.

II

THE COURT OF APPEALS WAS CORRECT IN RULING THAT PEDERSEN'S PROCEDURAL DUE PROCESS RIGHTS COULD HAVE BEEN SATISFIED BY THE ARBITRATION PROCEDURE OF THE COLLECTIVE BARGAINING AGREEMENT.

In November, 1979, the school district had a collective bargaining agreement with the union representing the maintenance employees, includind Pedersen. The collective bargaining agreement provided for a grievance procedure with the final step being binding arbitration for any dis-

.putes rising out of the agreement, including discipline and discharge of employees. Pedersen filed a grievance seeking reinstatement without loss of seniority and with full back pay and the matter proceeded through the various steps ultimately leading to arbitration. The arbitration hearing was held on July 22, 1980, and the arbitrator selected through the American Arbitration Association denied the grievances and upheld the discharge. (Arbitrator's Decision 23(a)-45(a)).

Prior to trial, the District Court consistently held that Pedersen's procedural due process rights could have been satisfied by either a hearing before the school board of directors pursuant to the school code or an arbitration hearing pursuant to the collective bargaining agreement. (Opinions of December 19, 1980, - January 26, 1981, and March 26, 1981). One week prior to trial, the District reversed its position and filed Orders May 4 & 6, 1981, (Petitioners' Brief 1(a)-8(a)), holding that in light of Barrantine v. Arkansas

Best Freight System, Inc., ___U.S. ___, 101 S. Ct. 1437 (1981) an arbitration proceedings pursuant to a collective bargaining agreement could not satisfy Pedersen's procedural due process rights. The Court of Appeals held that such an arbitration proceeding could satisfy Pedersen's procedural due process rights.

Where a public employee has an enforceable expectation of continued public employment, either by contract or statute, he may not be discharged except after notice and an opportunity to be heard. Bishop v. Wood, 426 U.S. 341, 96 S. Ct. 2074 (1976). The issue then becomes to what procedure is Pedersen entitled. The Pennsylvania School Code (24 P.S. §5-514) provides that an employee may not be discharged except after due notice and a hearing if demanded. The collective bargaining agreement provides that an employee may not be discharged except for just cause and contains a grievance procedure culminating in binding arbitration as required by the

Public Employee Relations Act (P.E.R.A.) 43 P.S. §1101.903.

Due process requires that in order to discharge such a public employee, he must be provided with the following procedural safeguards:

(1) written notice of the grounds for termination; (2) disclosure of the evidence supporting termination; (3) the right to confront and cross-examine witnesses: (4) an opportunity to be heard in person and to present witnesses and documentary evidence; (5) a neutral and detached hearing body; (6) a written statement by the fact finder as to the evidence relied upon. Chung v. Park, 514 F2d 382 (3rd Cir. 1965).

Pedersen contends that under Pennsylvaia law, he is entitled to a hearing before the board of school directors before he may be discharged. This position is quite simply worng. In Arnett v. Kennedy, 416 U.S. 314, 94 S. Ct. 1633 (1974) a majority of the Court did not hold that the forum

designated by a statute creating a property interest must be utilized. Rather once a property right such as continued employment is conferred the Court looks to the constitution to determine whether due process has been provided. It is the nature of the proceeding and not the forum which is the primary focus. Assuming for the moment Petitioner is correct, the Pa. Supreme Court in construing Section S-514 of the Pa . Public School Code together with P.E.R.A. held in Philadelphia Board of Education v. Philadelphia Federation of Teachers Local No. 3, 464, Pa. 92, 346 A2d 35 (1975) that the school board of directors may agree in a collective bargaining agreement to submit to arbitration a discharge hearing required under Section 5-514.

> "[T]he (Pa) Supreme Court has held that a school district may agree in a collective bargaining agreement to submit to arbitration the propriety of discharging a non-tenured teacher and in so deciding, rejected the argument that such a provision illegally delegated to an arbitrator, powers to remove employees conferred exclusively on the school board by provisions of the Public School Code of 1949. Board of

Education v. Philadelphia Federation of Teachers, Local No. 3, 464 Pa. 92, 346 A2d 35 (1975)." West Middlesex Area School District v. Commonwealth of Pennsylvania Board of Labor Relations, 423 A2d 781, 783, (Pa. Commonwealth 1980).

See also Pittsburgh Joint Collective Bargaining Committee v. City of Pittsburgh, 391, 2d 1318 (Pa. 1978), where the Court held that a disciplinary dispute must be submitted to arbitration pursuant to the grievance procedure rather than to the city's civil service commission pursuant to the Second Class City Code Civil Service Act, 53 P.S., Sec. 23401, et seq., stating at page 1320, "The rule is that, except when the contract clearly and expressly excludes the dispute from arbitration, the process set up in collective bargaining negotiations must prevail." In Donnellan v. Mt. Lebanon School District, 377 A2d 1054 (Pa. Commonwealth Ct. 1977) teacher filed a Complaint in county court for breach of his individual written contract rather than file a grievance under the collective bargaining agreement. The Court held that since

the dispute was arguably dealt with in the collective bargaining agreement, arbitration was the proper and only remedy presently available, under state law.

Provisions relating to discipline may properly be included in a collective bargaining agreement and if it is included, any challenge to the disciplinary action must be submitted to arbitration. Where the agreement does not contain any such provision then the employee may proceed through the procedures of the Local Agency Law and have a hearing before the School Board. Stroudsburg Area Board of Education v. Pennsylvania Labor Relations Board, 395 A2d 622 (Pa. Commonwealth 1978). See also Fairview School District v. Fairview Education Association, 368 A2d 842 (Pa. Commonwealth 1977) where terminations of temporary professional employees were handled through the grievance procedure. The union at first sought to have the matter adjudicated through the Local Agency Law, however, the

Court of Common Pleas of Erie County ruled that arbitration of the dispute pursuant to the grievance procedure was the only proper avenue for seeking redress and that such arbitration precluded resort to the Local Agency Law. (The Commonwealth Court did not rule on the correctness of this ruling, but did cite Board of Education v. Philadelphia Federation of Teachers, Local No. 3, supra.)

The common thread running through all of these cases is under Pennsylvania law, the public policy strongly favors arbitration and if the collective bargaining agreement entered in to by parties is subject to P.E.R.A., then any dispute which is arguably covered by the agreement's grievance procedure must be submitted to arbitration. Furthermore, a school board may delegate its authority to discipline employees to arbitration. Board of Education v. Philadelphia Federation of Teachers Local 3, supra. South Williamsport Area School District, a public employer subject to

P.E.R.A., entered into a collective bargaining agreement which provided for a grievance procedure and limited discharge only for just cause. The School District, therefore, delegated to the arbitrator the authority to determine whether an employee has been discharged for just cause.

The procedure given to Pedersen under the collective bargaining agreement clearly complied with due process. He received (1) written notice of the grounds for termination - the letter of November 12, 1979; (2) disclosure of the evidence supporting termination - November 15, 1979, hearing before the superintendent; (3) the right to confront and cross-examine witnesses; (4) an opportunity to be heard in person and to present witnesses and documentary evidence; (5) a neutral and detached hearing body - an arbitrator selected through the American Arbitration Association; (6) a written statement by the fact finders (here arbitrator) as to the evidence relied upon - written opinion and award.

The United States Supreme Court decision in Barrantine does not compel a contrary result that the arbitration would not provide Pedersen with the procedural due process rights to which he is entitled. Barrantine involved a claim by truck drivers that their employer violated the Fair Labor Standards Act (FLSA). The truck drivers were unsuccessful in their grievances filed pursuant to a collective bargaining agreement. They then filed claims in federal district court alleging violations of FLSA. The Court held that an employee's rights under the Act are independent of the collective bargaining agreement and need not be submitted to arbitration. The purpose FLSA is to insure that employees are protected from sub-standard wages and oppressive working hours and the employee's rights are non-waivable. The Court was concerned with a situation where the union has fairly and fully presented the employees wage claim, and the employee's statutory rights under FLSA might still not be adequately protected because arbitrators may not be conversant

with the public law considerations under the FLSA, The issue in the case presently before the Court was clearly within a labor arbitrator's expertise whether Pedersen was discharged for just cause.

In Brown v. Southeastern Pennsylvania Transportation Authority (SEPTA) 519 F.S. 864 ,(E.D. Pa. 1981), the District Court held that an arbitration procedure could satisfy due process stating at page 866:

> "The Pennsylvania Public Employee Relations Act ("PERA"), 43 P.S. §1101.201 et. seq. establishes a framework within which public employers and employees can negotiate and agree upon employee's wages and working conditions. After a collective bargaining agreement is in effect, as in the instant case, "(a)rbitration of the disputes or grievances arising out of the interpretation of the provisions of a collective bargaining agreement is mandatory." 43 P.S. § 1101.903. Except for the final state of the grievance review procedure, which must be binding arbitration, a public employer and a union may negotiate and agree upon the procedure by which employees' complaints will be reviewed. In the instant case, the grievance procedure is set forth in the collective bargaining agreement under the heading, "Grievance Procedure; Arbitration." Plaintiff has alleged that the defendants named in his complaint have denied him his right to proceed under this grievance procedure. Therefore, I find that Plaintiff has not stated a claim under 42 U.S.C. §1983."

See also Dulaney v. Board of School Commissioners of Mobile County, 512 F. Supp. 685 (S.D. Ala. 1981) where the Court held that where the employee received notice of the charges against him, appeared before the appeals council of the board to present his case, was assisted by a seasoned union representative and the members of the council were experienced in academic matters due process had been complied with. In Manning v. Bouton, 678, F2d 13 (3rd Cir. 1982) the Court held a discharged assistant attorney general should have pursued his wrongful discharge claim under the grievance procedures set forth in the collective bargaining agreement despite the fact he was not a member of the union.

Petitioners in their brief (page 32) assert that arbitration was not sufficient because (a) it was untimely (b) it was not an attempt at a due process hearing; (c) there was a potential conflict of interest on behalf of the union

and; (d) it could not grant Pedersen the full measure of relief. These assertions by the Petitioners under the facts of this case are simply untrue. At trial, Pedersen objected to any testimony being presented with respect to the timeliness of the arbitration proceeding and the potential conflict of interest on behalf of the union. The Pa. School Code does not refer to the hearing before the school board of directors as a "due process hearing". The issue is not whether the employer attempted to have a due process hearing, but rather whether the hearing provided to the Petitioner complied with due process and no where does he contend that the arbitration procedures offered him, fail to comply with due process. The final assertion that the arbitrator could not grant him full relief is absurd. In arbitration Pedersen was seeking reinstatement with back pay and no loss of seniority. (22 (a)).

It is hard to imagine what other relief the board of school directors could have awarded him.

CONCLUSION

The school district in discharging Pedersen did not violate his due process rights. He was offered notice of the charges against him and a hearing before an arbitrator pursuant to a collective bargaining agreement. The Court of Appeals was correct in holding that an arbitration proceeding such as that conducted in this case satisfied the due process procedures to which an employee is entitled.

Under Pa. Law, a school board of directors, may delegate its duty to have a board of director's hearing to an arbitrator where it is party to a collective bargaining agreement containing a provision for mandatory arbitration of disputes. Furthermore, both the District Court and Court of Appeals were correct in holding that under the Pa. School Code where an employee knows of his right to a school board of directors hearing, he must demand such a hearing.

The Court of Appeals neither departed from existing law nor created new law in its decision in this case but rather properly applied existing law to the facts of this case and accordingly this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

CASALE & BONNER, P.C.

By: John R Bonner
Attorneys for Respondents

AGREEMENT

THIS AGREEMENT, entered into this 17th day of October, 1977, by and between the SOUTH WILLIAMSPORT AREA SCHOOL DISTRICT, Borough of South Williamsport, Lycoming County, Pennsylvania, hereinafter called "Employer", and District Council 86, American Federation of State, County and Municipal Employees, AFL-CIO, hereinafter called "Union".

WITNESSETH:

In consideration of the mutual covenants and agreements herein set forth, the parties hereto do agree as follows:

ARTICLE IV

MANAGEMENT PREROGATIVES

Section I - Except as limited by the specific terms of this Agreement, the Employer retains the exclusive right to manage its operation and to direct the working forces including, but not limited to, the right to hire, suspend or discharge for just cause, promote and transfer employees, determine the size of the work force, job descriptions, schedules of work, hours of work and number of hours to be worked, to relieve employees from duty because of lack of work or other legitimate reasons, the setting of quality standards,

and the determinations of the source of material and supplies and the right to establish and enforce rules not inconsistent with this contract, it being understood the Employer retains all management rights not specifically limited by this Agreement.

Section 2 - While it is the policy of the Employer that sypervisors shall direct, train and instruct employees in the bargaining unit and assist in cases of any emergency, and not regularly perform work of men in the bargaining unit, the parties nevertheless recognize that from time to time supervisory employees may be required to assist in work in order to promote efficiency in operations.

ARTICLE VIII

GRIEVANCE PROCEDURE

Section 1 - Any grievance arising out of the meaning, interpretation of or compliance with the provisions of this Agreement shall be resolved according to the following procedure and any one officer of the Union, i,e, (Chief Steward, President or Vice President) shall, upon request, be given a reasonable amount of time during normal working hours to investigate or process a grievance:

Step I - the employee, either alone or accompanied

by the Union representative, or the Union where entitled, shall present the grievance, in writing on the form provided by the district, to the employee's immediate supervisor within five (5) work days of the date of the initial occurrences of the event, giving rise to the grievance. The supervisor shall attempt to resolve the matter and report his decision to the employee, in writing within five (5) work days of its presentation.

Step 2 - In the event the grievance is not settled in Step 1, the employee may appeal the same, in writing, to the Secretary of the school district within five (5) days after receiving the answer in Step 1. The Secretary of the school district shall respond in writing to the employee and Union representative within five (5) work days after receipt of the appeal.

Step 3 - In the event the grievance has not been satisfactorily resolved in Step 2, a written appeal may be made by the employee or Union representative within five (5) work days of the decision in Step 2 to the Superintendent or his designee, in writing, within ten (10) work days after receipt of the same.

Step 4 - If the grievance has not been satisfactorily resolved in Step 3, and it it meets the cri-

teria of Section 903 of Act 195, the employee or the Union may refer to the grievance to arbitration in accordance with Section 2 hereof.

Section 2 - Arbitration. If the grievance is not resolved at Atep 3, either party shall have the right to submit such grievance to arbitration in accordance with Section 903 of Act 195.

The party deciding to refer the grievance to arbitration shall notify the other party, in writing, of its intention to arbitrate within five (5) work days of the decision in Step 3. The parties, or their representatives, shall meet within seven (7) work days in receipt of such notice for the purpose of agreeing on an arbitrator. If the parties fail to agree on an arbitrator or if the arbitrator agreed on refuses to serve, the party bringing the matter to arbitration shall, within seven (7) work days notify the Bureau of Mediation and request the appointment of an arbitrator, in accordance with Section 903(1) of Act 195.

A. Arbitrators Duties - The arbitrator shall have no authority to add to, detract from or in any way change the terms of this Agreement or decide issues that are not the subject matter of this Agree-

ment, or subject to arbitration under Section 903 of Ac. 195.

B. All fees and expenses of the arbitration shall be shared equally between the parties.

C. The decision of the arbitrator shall be final and binding on both parties, except where the decision would require an enactment of legislation, in which case it shall be binding only if such legislation is enacted. This section does not however, prohibit either party from appealing to the appellate body.

Section 3 - If any grievance fails to meet the time requirements established in the procedure under Section of this Article, action on the grievance shall be deemed terminated and the last decision made shall be deemed final. If the Employer at any step fails to render its decision within the time periods established, the grievant shall be entitled to advance his grievance to the next Step. The failure to reply shall be deemed a denial.

Section 4 - The time limits provided for herein may be extended by mutual agreement of the

parties in writing.

Section 5 - All parties to a grievance may be represented at any stage thereof starting with Step 1.

WORK RULES

As the South Williamsport Area School system has grown over the years into a rather large, diverse operation, it deems necessary, to promote better understanding among the different work groups, that we operate under a standard set of working regulations. The complex nature of our operations needs to be understood by all employees. As the course of operations progresses, it is also obvious that a written set of "do's" and "do not's" would never be all encompassing, therefore, we feel it necessary to list acts of misconduct which are considered detrimental to the well-being of all. The committing of any of the following acts of misconduct will result in appropriate disciplinary action.

1. The falsification of any personnel records or any other school district records, including time sheets.

2. Insubordination, failure or refusal to carry out a work assignment.

3. Theft or removal from district premises any school district or employee property without authorization.

4. Attempting to defraud the school district by accepting or claiming pay for any period of unauthorized absence from the school district.

5. Participation in or agitation for a work stoppage or other work curtailment in violation of the labor agreement.

6. Conviction of a felony.

7. Lending orgiving school district keys to anyone not authorized by the district to receive such keys.

8. Bringing, using, possessing intoxicants or narcotics on school district premises at any time.

9. Abuse of sick leave by falsification of reasons for absence.

10. Failure to provide medical excuse for absence according to district requirements.

THE ABOVE MENTIONED VIOLATIONS WILL RESULT IN THE FOLLOWING DISCIPLINARY ACTION:

1st Offense - Written warning notice and a five (5) day suspension without pay, also a notice of intent

to discharge at the end of the five (5) day suspension, subject to review by the school board. A hearing on the charges for dismissal to be held with the School Superintendent during the five (5) day suspension.

11. Interferring or refusing to cooperate with school district security police in the performance of their duties.

12. Being under the influence of intoxicants or narcotics on school district premises at any time.

13. Habitual tardiness or repeated absence from work.

14. Immoral conduct or indecency, or using abusive, immoral, or obscene language to any fellow employee or supervisor.

15. Deliberately restricting output of work in the performance of assigned duties.

16. Gambling while on duty.

17. Failure to report for overtime work, without good reason, after agreeing to work.

18. Leaving the building or work assignment without the supervisor's permission.

19. Violating established safety rules or safety practice.

20. Endangering another employee or a student or causing injury to another employee or a student.

21. Engaging in horseplay, running, scuffling, or throwing things.

22. Smoking in non-smoking areas or deliberately creating a fire hazard.

23. Unauthorized possession of fire arms or other weapons or explosives on the premises at any time.

24. Fighting or provoking or instigating a fight on school district property, at any time. Threatening, intimidating, coercing, or interfering with other employees or supervisor.

25. Contributing to unsanitary conditions or poor housekeeping.

26. The deliberate and/or intentional destruction or damage of any school district or school district agents, tools, equipment, or property.

27. Failure to report accidents to employees, equipment or machinery.

28. Making false, vicious, or malicious statements concerning any employee, the school district or its students.

29. Countermanding orders of supervisor or assumption of management responsibilities without authority.

30. Selling, soliciting, collecting con-

tributions for any purpose or distributing any printed matter on the premises without the consent of the school district.

31. Loitering or sleeping during working hours.

32. Failure to notify supervisor of absence from work in accordance with required procedure.

33. Failure to observe assigned break time at any time other than scheduled time, without prior permission of the supervisor.

34. Use of school district vehicles, equipment, and materials for personal use without permission of the supervisor.

35. Failure to start work at the scheduled starting time, after reporting for duty.

36. Failure to notify school district of a change in address and/or telephone number within three (3) working days following such change.

37. Parking in an unauthorized area, or parking in an authorized area in such a manner so as to interfere with the movement of other employee's automobiles.

38. Allwoing unauthorized passengers on or in school district vehicles.

THE ABOVE MENTIONED VIOLATIONS WILL RESULT IN THE FOLLOWING DISCIPLINARY ACTION:

1st Offense - Written warning.

2nd Offense - Written warning and a three (3) day suspension without pay.

3rd Offense - Written notice and five (5) day suspension without pay, with notice of intent to discharge at the end of the five (5) day suspension, subject to a review by the school board. A hearing on the charges for dismissal to be held with the School Superintendent during

It is understood that the foregoing acts of misconduct do not limit the violations for which the school district may discipline an employee under the offenses covered in these acts of misconduct. The school district may exert discipline in other types of cases, should the situation warrant.

If any provision of this policy should be in conflict with provisions of the "School Code" or any labor-management agreement then in existence between the South Williamsport Area School District and any organization representing employees,

then provisions of said "School Code" or labor-management agreement shall apply.

TRIAL TESTIMONY OF DANNY REASER

What occurred?

A. Okay. We were working down the football field, and Mr. Pedersen came up to me and he pointed his finger at my nose, and he said if we ever get caught, I'll go to jail, but Mr. Pedersen and Guy McClowsky can make restitution.

BY THE COURT:

Q. Now sir, I couldn't hear the last. Say it again.

A. Okay. I would to to jail, Mr. Pedersen and Guy McClowsky could make restitution.

BY MR. BONNER:

Q. What effect did this have on you?

A. It bothered me tremendously.

Q. Then you made the phone call asking Mr. Lesher--if he would talk to you?

A. Yes.

Q. And what did Mr. Lesher tell you?

A. He said he was in a meeting, but he would come up.

Q. And did you go up to Mr. Lesher's office?

A. Yes, I did.

Q. Did you meet with him?

A. Yes, I did.

TRIAL TESTIMONY OF JOHN HATFIELD

BY MR. BONNER:

Q. Mr. Hatfield, as in your position with the union, did you receive a telephone call from Mr. Henry Pedersen on November 9, 1977?

A. Yes, in the afternoon.

Q. And what, if anything, did Mr. Pedersen relate to you at that time?

A. He wanted to set up an appointment with me in the office dealing with a letter

of suspension.

BY THE COURT:

Q. What was the date you got this call?

A. On the Ninth of November. It was probably around four o'clock, maybe five o;clock in the afternoon.

THE COURT: All right.

BY MR. BONNER:

Q. And at Mr. Pedersen's request to meet with you, did you arrange for a meeting?

A. Yes, the following Monday,

Q. Which would have been what date, sir?

A. The thirteenth.

Q. And did you, in fact, meet with Mr. Pedersen on November 13th?

A. Yes, I did.

Q. And what, if anything, any papers from the school district did Mr. Pedersen have with him at that time?

A. He brought his letter of suspension pending further investigation and he brought a copy of the work rules, and I think he brought a couple of excerpts from the school board code.

BY THE COURT:

Q. The what?

A. The School Code.

BY MR. BONNER:

Q. I show you what has been marked for identification as Plaintiff Exhibits 3 and 4 and identified by Mr. Pedersen as such and I ask you if they are the two letters of the school district which Mr. Pedersen had with him at the time?

A. These are the two official letters that he had.

Q. Now did you in fact discuss with Mr. Pedersen the contents of these two letters?

A. Yes sir.

Q. And did he request of you to represent him at the hearing of November 15?

A. At the time that we met, we went over

both the letters, the charges that were raised against him, and how to proceed. He wanted to know how we would proceed in this case.

I explained it to him we would file a grievance at the beginning of the third stage of the grievance procedure --

MR. RIEDERS: Your Honor. I'M sorry. I object to the witness narrating without there being a specific question. I also object to the content because again he is going into an arbitration and not to this issue as to whether he waived the hearing that he was entitled to.

MR. BONNER: Your Honor, I believe that there was a question on the floor as to what his conversation was with Mr. Pedersen.

THE COURT: Well, it seems to me, though, that the Plaintiff doesn't really have much opportunity to object to some subject matter which might not be proper to be heard by the jury, and so I think it would be better if you would ask him precise questions than try to narrow the answers

down as much as you can.

MR. BONNER: Okay.

BY MR. BONNER:

Q. Mr. Hatfield, If I understand you correctly then, basically you went through the contents of the two correspondence, the two pieces of correspondence?

A. Right.

Q. And Mr. Pedersen asked you about how the Union would proceed with this matter.

A. Yes.

Q. And did Mr. Pedersen ask you about any other rights that he may have?

A. Yes, He asked me about asking for a hearing before the school board.

Q. And what did you respond to him when he asked you about that?

A. My response to him was that he was fired by the administration of the school; and although he had a right to go to the school board and ask for a hearing, I didn't think

that they would overrule the administration of the school. But yet, if he wanted to take that route, he had a perfect right to do so.

TRIAL TESTIMONY OF HENRY PEDERSEN

Q. At the hearing before Dr. Vollbrecht, did you receive a notification from the school board secretary?

A. On what?

Q. On the fact that the school board had voted to terminate your employment.

A. Yes.

Q. Now was that on the Nineteenth of November that they voted? I believe that was your testimony.

A. Ibelieve so, yes.

Q. When did you contact an attorney?

A. Towards the end of November.

Q. November of 1979.

A. Yes sir.

Q. Did you ask the attorney what your

rights were that you have?

A. Yes sir.

Q. And did your attorney tell you that you had the right to request a school board hearing?

A. He advised me, yes sir.

Q. And that was in November of 1979?

A. Yes sir.

Q. When, Mr. Pedersen, did you file your grievance for labor arbitration?

A. I believe it was the Twentieth.

Q. The Twentieth.

A. I believe.

Q. Of November?

BY MR. BONNER:

Q. Who did you file it with on the Twentieth of November, Mr. Pedersen?

A. I think it was Harold Day.

Q. And after a period ot time, did you come to learn that Mr. Day had not filed it with the school district?

A. Yes.

THE COURT: We don't know who Harold Day

is.

MR. BONNER: I'm sorry.

BY MR. BONNER:

Q. Who is Mr. Day?

A. He was the local president.

Q. Your Union President?

A. the local Union President, yes.

Q. And you handed him the grievance approximately on the twentieth or the twenty-first of November.

A. No. Actually I handed it to him on the Fifteenth, really, of November.

Q. And you were at that point grieving your termination, is that right?

A. In November, yes.

Q. But in fact the school board hadn't even terminated you yet, had they?

A. No.

Q. So, then after you got the notice on the Twentieth or the Twenty-first, the school board had voted and terminated you, did you again contact Mr.

Day and ask him to have the grievance start in motion?

A. I presume that it was already in motion. I did call him on the phone and asked him.

Q. You did call him.

A. Yes.

Q. And you told him that you wanted to file a grievance.

A. Yes.

Q. Is that right?

A. Yes.

Q. And did there come a point in time a few days later that you learned that the grievance had not been filed?

A. Yes.

DEPOSITION OF HENRY PEDERSEN

It's out of Lewisburg's hands now, as I understand.

I feel when they're ready to notify me of a hearing on arbitration, that I will be notified in

due course.

Q. Through that arbitration what are you requesting, Mr. Pedersen?

A. That I be reinstated with full pay, benefits. Reinstated. Full pay, benefits. Just the way things were, you know, before.

Q. And you began that the date of Dr. Vollbrecht's decision, is that correct?

A. On Nobember 15th.

Q. When did you first contact an attorney?

A. It was in November. It was after I found out that the union official, Harold Day, hadn't processed my grievance.

Q. Who told you that Mr. Day had not processed your grievance?

A. Himself. He said he forgot.

Q. Were you present when the grievance was handed to Mr. Lesher on Ocotber the 15th at the conclusion of the hearing?

A. No.

Q. You were not present?

AMERICAN ARBITRATION ASSOCIATION

Peter Florey, Arbitrator

IN the Matter of Arbitration	:	AAA Case No. 14 30 0632 80R
between	:	
SOUTH WILLIAMSPORT AREA SCHOOL DISTRICT	:	Grievance Nos. 6-660-1135/1179/ 1181 and 6-660-1137/1178/ 1187
AND	:	
DISTRICT COUNCIL 86, American Federation of State, County and Municipal Employees	:	ARBITRATOR's OPINION AND AWARD
	:	Award Issued:
	:	July 31, 1980

Subject: Discipline - Suspension - Discharge for Theft and Use of District Property.

Contract Provision Involved:

Article IV of the October 17, 1977 Agreement.

Statement of the Award:

All six grievances are denied.

BACKGROUND

The Union protests the suspension and discharge of two Maintenance Men, Henry Pedersen and Guy McClosky. The case was heard in Williamsport, Pennsylvania, on July 22, 1980. The Union was represented by Richard A. Zamboni, Staff Representative; the District by John R. Bonner, Solicitor. Written transcripts of disciplinary hearings before the Superintendent were submitted by the parties.

The District employs about four or five maintenance men who are supervised by a working foreman. Some years back, the grievants were discharged for unauthorized use of school vehicles, but were reinstated by an arbitrator. The parties did not submit the arbitrator's decision, but there was some reference at the hearing that the arbitrator apparently based his decision on the lack of written rules. Shortly after the issuance of the decision in that case, the District promulgated rules which are attached to this decision as District Exhibit No. 1.

Apparently, Pedersen and McClosky carried a grudge against the District and their immediate supervisor, Robert Reish, as a result of this experience, and the record reflects that at least Pedersen refused to work overtime in the early part of 1979.

Reish left the District in May of 1979, and Robert G. Lesher, then an Assistant to the Superintendent, took over the direction of the maintenance force. He met with the men to work out a procedure for their cooperation. Pedersen s stepped forward and told Lesher, that, since he had the greatest seniority among the men (he also was chief shop steward for the entire bargaining unit which, in addition to Maintenance, includes the janitorial force) he would assume leadership of the men. This proposal suited the administrator since he was busy with other matters and, from then on, he relied on Pedersen to act as the working foreman. His duties even included the ordering of supplies.

However, the departure of Reish did not bring harmony to the maintenance force, which was polarized between the oldtimers, Pedersen and Mc Closky, and two newly employed men, Wayne Koch and George Michaels, who were two younger men. Between these two groups was Danny Reaser, who came to the department after the 1977 discharges of Pedersen and McClosky. His "allegiance" was sought by both groups; apparently he threw in his lot with Pedersen and McClosky, because they were the "in" group who wielded the power in the department. The younger men, especially Michaels, resented being treated as the errang (sic) boys who had to do all the heavy work.

On August 27, 1979, the District hired Fred Agnoni as a new maintenance supervisor, to the apparent consternation of Pedersen, who fully expected to be named to this position himself. He and McClosky immediately showed their displeasure by displaying minimal cooperation with Agnoni. On the other hand, Michaels finally

'spoke out and refused to do personal favors for Pedersen and McClosky.

Agnoni found that grievants' work day consisted primarily of coffee breaks and extended luncheons, and set about to tighten up discipline. He met great resistance, particularly from Pedersen, who informed him that he got rid of the prior supervisor in seven years, but that with him it would take him only seven weeks.

One particular practice which Agnoni set out to change was the habit of the men to return to the shop for their 10 minute coffee break even though they were near facilities where they could have enjoyed their respite.

Matters came to a head late in September when several maintenance men, including Pedersen, were sent to the football field for a post-game clean-up. Agnoni specifically instructed the crew to take their break at the field, which was adjacent to the junior high school where

the men could have taken a break and bought some coffee. However, Pedersen returned to the shop, allegedly to pick up his rain gear, and informed Agnoni in no uncertain terms that he would take his breaks where and when he wanted, and that he would take no instructions from any "wop." (Agnoni apparently is of Italian extraction.)

As a result, he was given a five day suspension for the following reasons:

> "This letter is written in affirmantion of action taken yesterday, October 9, 1979, in the form of your supsension for a period of five (5) days commencing at 9:00 A.M. Tuesday, October 16, 1979. This suspension is given for violation of work rule #2, i.e., "insubordination, failure or refusal to carry out a work assignment."

The following instances support this decision:

1. Failure to carry out the direct order of your immediate supervisor.

2. Use of abusive or obscene language to a supervisor or fellow worker.

3. Deliberately restricting the output of work in the performance

of assigned duties.

4. Leaving a work assignment without the supervisor's permission.

5. Threatening, intimidating, or coercing other employees or supervisor.

"It is for the aforementioned reasons that you are suspended without pay for a period of five days. As I indicated to you previously, the school district cannot sanction this type of behavior and attempt to modify it accordingly."

This action is covered by grievance No. 6-660-1137.

About the same time, Guy McClosky was assigned to paint with George Michaels. As he recalls he was not dressed properly for painting that morning, and, therefore, only taped a little bit. In any event, his "buddy", came to Lesher and complained that he was not about to "baby-sit" McClosky and do the whole job himself. As a result, McClosky was suspended for five days and given the following letter:

"This letter is wirtten in affirmation of action taken yesterday in the form of your suspension for a period of five (5) days commencing at noon on Wednesday, September 26, 1979, and concluding at 11:30 A.M. on Wednesday,

October 3, 1979. This suspension was given for violation of work rule #2, i.e. insubordination, failure or refusal to carry out a work assignment.

"The following instances support this decision:

1. Failure to cooperate with your immediate supervisor.

2. Deliberately restricting output of work in the performance of assigned duties.

3. Failure to work with fellow employee as assigned.

"It is for the aforementioned reasons that you are suspended without pay for a period of five days. As I indicated to you in our discussion, the school district cannot sanction this type of behavior from any employee.

"It is our intention that you return to work at 11:30 A.M. on Wednesday, Ocotber 3, 1979. It is my sincere desire that you reflect upon your behavior and attempt to modify it accordingly.

Michaels' actions increased the tension in the department and Pedersen and McClosky worked out Reaser to snub Koch and Michaels and to become a united team with them.

As Reaser related at the arbitration hearing, they reminded him that he had participated in the

theft of District property with them and, while they would be able to make restitution, it would be financially impossible for him to do so, and he would lose his job should they blow the whistle on him.

Reaser testified that he mulled this threat over in his mind for a little while and decided that it would be the better course of action to go to the District and make a clean breast of his involvement with Pedersen and McClosky.

Therefore, he went to see Lesher and told him of several instances in which District property had been taken by himself, Pedersen and McClosky, and gave a specific account of the use of District property and vehicles by Pedersen and McClosky.

For the purposes of the record it is not necessary to spell these out in detail; they are reflected in the transcript of the disciplinary hearings. It suffices to state that both Pedersen and McClosky pretty much treated the workplace as

their own shop and spent considerable time in working on their projects. Also, they had no hesitancy in using school supplies.

In addition, Pedersen took inventories of District tools which had been issued to the maintenance men out of the files after Reish left and handed them to the employees to dispose of them as they saw fit.

After the District reviewed the information provided by Reaser, it suspended all three men for five days subject to discharge.

The notice given to Pedersen:

> "You are hereby advised that the hearing before South Williamsport School Superintendent concerning your suspension and intent to discharge will be held on Thursday, November 15, 1979, at 3:15 P.M. at the Superintendent's office in the South Williamsport Area High School.
>
> "You are further notified that you have the right at this hearing to be represented by council of your choice, to present witnesses, to testify yourself and to cross examine any witnesses that may be called to testify against you.
>
> "The acts of misconduct for which you have been suspended involves the following:

1. Theft or removal from district premises, school district property without authorization.

2. Unauthorized use of district property or vehicles.

3. Agitation for a work stoppage or work curtailment in violation of the labor agreement.

4. Repeated absences from work.

5. Use of obscene and abusive language to fellow employees and supervisor.

6. Deliberately restricting output of work in the performance of assigned duties.

7. Leaving a work assignment without the supervisor's permission.

8. Making vicious or malicious statements concerning your supervisor.

9. Failure to start work at the scheduled starting time after reporting for duty.

10. Threatening, intimidating, coercing or interfering with other employees or supervisor.

11. Failure to notify supervisor of absences from work in accordance with required procedure.

"Again you are notified to appear for the hearing set forth above and further notified that the hearing will be held in your absence if you so desire."

The notice given to McClosky read:

"You are hereby advised that the hearing before South Williamsport School Superintendent concerning your suspension and intent to discharge will be held on Thursday, November 15, 1979, at 4:00 P.M. at the Superintendent's office in the South Williamsport Area High School.

"You are further notified that you have the right at this hearing to be represented by council of your choice, to present witnesses, to testify yourself and to cross examine any witnesses that may be called to testify against you.

"The acts of misconduct for which you have been suspended involve the following:

1. Insubordination, failure or refusal to carry out a work assignment.

2. Theft or removal from the district premises, school district property without authorization.

3. Agitation for a work stoppage or work curtailment in violation of the labor agreement.

4. Abusive or obscene language toward your supervisor.

5. Deliberately restricting output of work in the performance of assigned duties.

6. Deliberate or intentional destruction or damage of school district property.

7. Making vicious or malicious statements concerning your supervisor.

8. Countermanding orders of your supervisor.

9. Failure to notify supervisor of absences from work in accordance with required procedure.

10. Threatening a fellow employee.

11. Failure to start work at the scheduled starting time after reporting for duties.

"Again you are notified to appear for the hearing set forth above and further notified that the hearing will be held in your absence if you so desire."

As a result of the hearings, the District decided to discharge Pedersen and McClosky, but to commute Reaser's discipline to a five day disciplinary suspension and restitution.

In the case of Pedersen the superintendent made the following statement at the disciplinary hearing:

"Are we back on the record? In my deliberations during the recess, I reviewed the notes and the testimony as presented. I believe that the testimony as presented by the individual witnesses represents and demonstrates very serious infractions of school regulations and policies, as well as very serious infractions of the law which I believe are credible, and cannot condone. This shows evidence of work related problems regarding employee misconduct. I am requesting the School District Solicitor, Mr. Bonner, review the evidence

and determine a course of legal action. In addition, my decision is that Mr. Pedersen be terminated from the School District effective November 19, 1979, the end of the suspension period. This decision will be presented to the Board of Education, in Executive Session. The facts will be placed on record in Mr. Pedersen's personnel file."

His verdict concerning Mr. McClosky was:

"I'd like to note that this responsibility is an extremely unpleasant one for a variety of reasons, as I'm sure it is for those individuals sitting around the table. In my deliberations during the recess that we just had, I find the following:

"I believe the witnesses to be credible, that the testimony presented by these witnesses demonstrates extremely serious infractions of the school regulations, policies, in addition, very serious infractions of the school, of the law. It also has been shown that Mr. McCloskey has demonstrated misconduct in the accomplishment of work duty assigned to him, in particular in terms of using School District facilities. I'm directing the School District Solicitor to review this evidence and determine a course of legal action. Finally, my decision is that Mr. McClosky be terminated from the School District, effective November 19, 1979. This decision will be presented to the Board of Education in Executive Session where personnel matters are handled. In addition, I want the facts to be placed in record in Mr. McClosky's personnel file. Thank you."

The superintendent's reasoning in the case of Danny Reaser was:

> "this is the hearing of Mr. Danny Reaser, the South Williamsport Area School District, November 15, 1979. In my deliberations during this recess, I have taken the following into consideration. 1. The facts as presented by Mr. Bonner, the School Solicitor, regarding the theft of School District property and the plea for leniency on the part of the Assistant Superintendent, Mr. Robert Lesher, I do consider the 8 year unblemished record to be significant, Danny. Secondly, I respect the fact that you did come forth with a cooperative attitude in relating of the facts with a cooperative attitude in relating of the facts and circumstances surrounding the theft of School District property. While I must condemn this kind of behavior, I cannot but admit that in essence your role was questionable with regard to leading in this particular activity. My decision is that you make restitution, that Mr. Lesher prepare an itemized list and the costs involved, and submit that to Mr. Reaser through Mr. Bonner, and that you serve the remainder of your suspension without pay up to Monday, November 19, 1979, and that you be reinstated on that day as a maintenance employee. This decision will be presented to the Board of Education in Executive Session which means that it will not be public, and the incident be placed in Mr. Reaser's personnel file. Thank you."

At the arbitration hearing, Reaser gave a detailed account of the alleged offenses. Both grievants categorically denied his charges, with one exception: they acknowledged that they split a case of butter, but placed the incident in an earlier year and explained that the case had been given to them by a warehouseman because it had been damaged.

The District asked the arbitrator to resolve the question of credibility in favor of the school system. It points out that Pedersen considered himself the kingpin in the maintenance department and was very upset when he was forced to accept the orders of a new supervisor. As the District views the events reflected in the record, Pedersen and McClosky had a good thing going for themselves, and were offended not only when it came to an end, but also when they found out the two younger men would no longer do their bidding.

The Union, on the other hand, discredits Reaser's account and points out that the School District never undertook a serious investigation and failed to make searches at grievant's homes, for the property they allegedly took from the school district.

The Union also argues that disparate penalities were meted out in this case: Reaser got off with a mere five-day suspension while the two grievants were fired.

As the Union sees it, it was common practice among employees to work in the shop on their own projects. It explains that both grievants worked on their own equipment during their lunch hour and before or after work hours. It also belittles the rule infractions of the two grievants as not serious enough for discharge.

Turning to the disciplinary proceedings, the Union points out that the discharge letter cites the same offenses for which grievants already were suspended previously. It also attacks the

rules of the District as unreasonable, since they permit "piggy backing."

FINDINGS

Turning first to the rules promulgated by the District, it is apparent that they fall into two groups. The first group covers serious offenses for which discharge can be imposed for the first offense if the situation warrants it. The second group of offenses has a more formal system of progressive discipline, where a written warning is given for the first offense, followed by a three day suspension for the second offense, and a written notice and five days suspension subject to discharge for the third offense.

On their face, these rules do not seem to be unreasonable; they follow the patern of similar disciplinary systems. In the end, it always depends how an employer implements rules or applies them in a given circumstance and, for this reason, we have to review each individual instance.

Turning first to Pedersen's open and continuing defiance of Agnoni's authority, for which the football field work assignment was only the triggering incident, it is clear that the District had proper cause to take a very serious view of Pedersen's attitude and actions, and that a five-day suspension was proper at the time.

Likewise, McClosky obviously tested Agnoni's resolve when he refused to accept the painting assignment, and he was properly given a give-day suspension for his insubordination. Apparently, other circumstances were present in McClosky's case which were not fully developed at the hearing. Right after his discharge he also quit his job as a prison guard and put himself under a doctor's care. By his own account he had not recovered yet at the time of the arbitration hearing. Therefore, it is quite likely that, as charged by Reaser, McClosky actually was disabled during the latter part of his employment with the District and performed very

little actual work but was content to have the "young Turks" work under his supervision.

Coming to the actual discharges, it would not be reasonable to treat the District's disciplinary letters as "indictments" and to expect the employer to prove every single allegation. It is obvious that the documents were drawn up by a layman who attempted to list all known derelictions of the two men, thereby combining their past records with the incidents which triggered the discharge. As a result, these letters recite the whole disciplinary background of each grievant and set the stage for the disciplinary hearing in which the Administration planned to consider not only the immediate transgression of the employees, but also to review their whole record in order to support the reasonableness of the penalties. Therefore, the wording of these letters cannot affect the discipline.

Turning to the record, it supports the charges of the informant. There was no apparent

reason why Reaser had to step forward and level his accusation against Pedersen and McClosky and to implicate himself. I believe Reaser that no promise was extended to him by the District for turning in his two buddies and that he fully accepted the risk of being discharged himself.

He found himself in an untenalbe position: he was being blackmailed to support the machinations of Pedersen and McClosky, and was pitted against the two other guys, who, by age and personality, were much more akin to him than Pedersen and McClosky.

It may be true that the items taken by the two grievants were of no great value when compared to embezzlements of white collar criminals, who take millions of dollars with impunity. Also, the use of district facilities for the personal benefit of employees may have been a widely accepted practice at one time. However, a new wind blew when Agnoni took over the shop. After all, an employer has the right to set matters straight

with proper warning. Moreover, the record does not implicate Reish, and Pedersen and McClosky apparently started their spree when Lesher put them in the driver's seat. Even if any transgressions prior to Agnoni's arrival are set aside, it is still clear that the two grievants viewed the new supervisor with great disdain and set out to make his life miserable and to flaunt his authority in a systematic fashion.

By their actions, the grievants have effectively destroyed any basis for a future employment relationship with the District and even a lengthy suspension would not correct this situation.

In light of the whole record, their grievances cannot be sustained.

AWARD

All six grievances are denied.

Peter Florey,
Arbitrator

Note: At the hearing, the Union charged, but failed to prove convincingly that Agnoni master-minded an assult on Pedersen who had several teeth knocked out by two men who jumped him at a football game. The matter is in the courts and cannot reasonably affect the outcome of this case. Should Agnoni be the culprit, he clearly acted as an individual because Pedersen insulted his Italian heritage and not in any official capacity for the District.